Builders' Liens

Towards Greater Assurance of Payment

Final Report of the Joint Government/Industry Task Force on Builders' Liens

Part 1 - December 1989

90-05218/

Joint Government/Industry Task Force on Builders' Liens

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December 1, 1989

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Dear Mr. Rostad:

It is my pleasure to submit to you the Final Report of the Joint Government/Industry Task Force on Builders' Liens (Part 1). This report represents the completion of the Task Force's primary work of reviewing the current Builders' Lien Act and drafting proposed legislation embodying its recommendations to the government.

Since mechanics' lien legislation was first enacted in Alberta in 1906, it has been amended, consolidated and re-enacted thirty times. The Task Force's proposed Construction Payment Act would, if implemented, represent a significant step in the evolution of Alberta's lien legislation. The introduction of a comprehensive trust regime for the construction and oil and gas industries, including a separate consolidated trust account, mandatory registration of all contractors and subcontractors and strong penal sanctions for breach of trust, would mark the arrival of a new generation of lien legislation.

The recommendations in this report are in many respects bold and progressive. Although many of them are new to Alberta, they have withstood the test of time in many other jurisdictions. California has no statutory holdback and has had a registration system for contractors for a long time. The construction industry in Ontario, Manitoba, Saskatchewan and British Columbia has lived with a statutory trust for many years. The recommendations should be viewed as a whole. The logic of the recommendation for the removal of the holdback, for example, is dependent upon strong and effective trust provisions. These in turn are, to a large extent, dependent on the recommendations for industry registration and the separate trust account.

When the Task Force began its review in 1987, the recession which Alberta had just gone through was still fresh in everyone's mind. During the recessionary period, reliance had been placed on the Builders' Lien Act as a collection vehicle and it had been found inadequate in a number of respects. Although the urgency to address the shortcomings of the Act may not appear as pressing now, given the cyclical nature of the construction and oil and gas industries, it is a virtual certainty that the legislation will be put to the test again.

The key elements of the proposed Construction Payment Act represent the unanimous recommendation of a task force made up mainly of industry representatives. As the proposed legislation will affect the two largest industrial sectors of Alberta's economy, it is hoped that the government will feel confident that the recommendations of this report have a broad base of support and will act upon those recommendations. While this broad base of support may not extend to some home builders, there is substantial support from the subtrades and suppliers in the residential housing sector. The Task Force has a special chapter dealing with this area in this report.

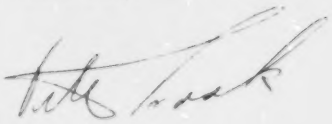
This Final Report could not have been completed without the contribution of many people. A significant number of individuals and associations made submissions both before and after publication of the Preliminary Report. On behalf of the Task Force, I wish to thank all those who provided their comments to it.

Two members of your department deserve special mention for their assistance to the Task Force. Harris Wineberg, Counsel to the Task Force, gave his enthusiastic support and unwavering commitment to the work of the Task Force while Richard Larson, Legislative Counsel, transformed, with patience and good humour, the ideas of the Task Force into the proposed legislation which forms so important a part of this report. Their expertise proved invaluable to the Task Force.

My task as Chairman was made easier by the dedication and hard work of the members of the Task Force. The process of developing ideas, consulting industry, reconsidering the preliminary recommendations and reviewing numerous drafts of the proposed legislation required a significantly greater time commitment than was initially expected. Nevertheless, virtually all members continued their strong interest and commitment throughout.

All of which is respectfully submitted.

Yours truly,



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Chapter One:

The Preliminary Report

1. The Preliminary Report

In September 1988, the Task Force issued its preliminary report "Builders' Liens: Towards Greater Assurance of Payment". The Preliminary Report covered the history and method of operation of the Task Force. It reviewed the problems with the current Builders' Lien Act which had been expressed to the Task Force, both by its own members and by persons who made submissions to it, and discussed in detail the principles, and the reasoning behind those principles, whose adoption and implementation the Task Force felt would, to a large extent, overcome the problems with the existing legislation.

In order to fully appreciate and understand this Final Report, the Preliminary Report of the Task Force should be read first. Copies of it are available from the Attorney General's department.

2. Summary of the Preliminary Report's Recommendations

Early in its deliberations, the Task Force resolved that the primary objective of its proposals would be to create a legislative framework which would provide greater assurance that everyone in the construction and oil and gas industries who makes improvements to land or provides material for its improvement would be paid. The main recommendations of the Task Force to achieve that objective were summarized in the Preliminary Report in the following manner:

(a) implementation of comprehensive trust provisions;

(b) a requirement that the trustee maintain a consolidated trust account for all trust funds;

(c) implementation of a new remedy called a "Stop Notice" such that the remedy to pursue trust funds would be separate from, and independent of, the remedy to encumber land;

(d) elimination of the statutory holdback;

(e) institution of a registration requirement for all contractors and subcontractors in both the construction and the oil and gas industries who, in the normal course of business, handle trust funds;

(f) an increase in the lien period for the oil and gas industry to 90 days; and

(g) the Crown should be bound by the Builders' Lien Act.

3. Circulation of the Preliminary Report

The Preliminary Report was not a report to the government. Since it contained many novel ideas, the Preliminary Report was intended as a consultative document, inviting further input from members of the general public as well as from anyone within the construction and oil and gas industries. To provide as broad a discussion as possible, the Preliminary Report was widely circulated. Members of the Task Force distributed copies to their respective associations. As well, advertisements were placed in the major daily newspapers throughout the province announcing its availability. Some four thousand copies had been distributed at the time of writing this report.

In the months following publication of the Preliminary Report, the Chairman, Counsel and members of the Task Force met with numerous groups and associations to discuss the recommendations and to seek their views on them. Further briefs responding to the recommendations of the Preliminary Report were received and considered by the Task Force well into 1989.

The drafting of the proposed Construction Payment Act commenced in January 1989. It too was distributed to those associations represented on the Task Force as well as to the relevant committees of the Alberta Branch of the Canadian Bar Association. Further comments with respect to the proposed legislation were received until the end of September 1989.

Chapter Two: The Final Report

1. Introduction

Unlike the Preliminary Report, this Final Report is a report to the government. It represents the final step of the Task Force in fulfilling its mandate "to prepare draft legislation implementing the findings and recommendations of the Task Force."

Part 1 of this Final Report will review and, where considered necessary, expand upon the recommendations of the Task Force contained in its Preliminary Report. It will then discuss the public debate which those recommendations engendered and will explain the Task Force's conclusions with respect to the points raised during that debate. Lastly, it will set out the Task Force's proposed Construction Payment Act, a completely new and rewritten statute which is intended to repeal the current Builders' Lien Act and certain sections of the Public Works Act, consolidating all construction payment mechanisms and remedies into one statute.

Part 2, to be published at a later date, will set out the Task Force's proposed regulations made pursuant to the proposed Construction Payment Act. These regulations deal mainly with the proposed scheme of "delegated regulation" which would require the registration of all contractors and subcontractors in the construction and oil and gas industries who, in their ordinary course of business, handle trust funds.

2. Objective of the Task Force

The primary objective which has guided the Task Force throughout its deliberations has been to fashion legislation which would provide greater assurance of payment for those who make improvements to land or supply materials for its improvement than does the current Builders' Lien Act. Generally, this objective is to be met in two ways. The first is to facilitate the availability of a greater cash flow to pay for the improvement by eliminating the statutory holdback and by eliminating the statutory requirement that no money can be paid by the owner while there is a lien registered against his title.

The second is to ensure that the money which is available for financing the improvement flows through the contractor to those subcontractors and suppliers who are owed money, without being siphoned out of the flow in one way or another. This is reflected in the recommendations for a comprehensive trust regime including a consolidated trust account and registration.

As proposed in the Preliminary Report, the main recommendations to achieve the objective of greater assurance of payment continue to be:

(a) implementation of statutory trust provisions;

(b) a requirement that the trustee maintain a consolidated trust account for all trust funds;

(c) elimination of the statutory holdback;

(d) institution of a registration requirement for all contractors and subcontractors in both the construction and the oil and gas industries who, in their ordinary course of business, handle trust funds;

(e) an increase in the lien period for the oil and gas industry to 90 days;

(f) inclusion of the Crown in the Construction Payment Act with a streamlined claims procedure for subcontractors and suppliers where the Crown is the owner; and

(g) retention of lien rights.

It should be noted that the Task Force is no longer recommending the "Stop Notice" remedy, which it had proposed in the Preliminary Report, because it was found to be conceptually unworkable. On the other hand, the Task Force is recommending in this report a significant change from the "lien fund" concept which should permit a more continuous flow of funds. Further discussion concerning the "Stop Notice" and "lien fund" concepts will be found later in this report.

3. Lien Retained - Trust Added

The Task Force has always favoured retention of the builders' lien. It has been, and will continue to be, the primary remedy if the owner does not pay. However, the lien alone will not provide the greater assurance of payment which the Task Force seeks to achieve because, if the owner is paying, the lien does not include a mechanism to ensure that funds flow through the contractor to subcontractors and suppliers. This is the intended role of a comprehensive trust regime.

4. A Comprehensive Trust Regime

A statutory trust, a separate consolidated trust account, strong penal sanctions for breach of trust and mandatory registration should provide greater assurance that money paid by the owner to the contractor will flow through the contractor to subcontractors and suppliers to the extent that they are owed money. The Task Force's recommendations go further than merely the imposition of a statutory trust since in order to be truly effective, the statutory trust must be adhered to by industry. The recommendations of a consolidated trust account, an industry-administered registration procedure and strong penal sanctions are intended to promote compliance with the trust concept by discouraging breaches of trust.

5. Elimination of the Statutory Holdback

It is assumed by the Task Force that a comprehensive trust regime, which includes the requirement of a consolidated trust account, mandatory registration and strong penal sanctions will, by and large, accomplish its intended objective. The Task Force balanced the complexity which the 15% holdback causes in the legislation and its administration with the reality that it is virtually worthless security considering the expense of recovering any of it, even if it were to exist, and concluded that the statutory requirement for a holdback should be eliminated.

However, the Task Force does realize that there will generally be money held back pursuant to the contract to assure proper completion of the project. This money will continue to be available to lien claimants if the lien is registered while there is money owing by the owner to the contractor. It should be noted that such a contractual "holdback", unlike the current statutory one, will not be immune from counterclaims arising out of the project.

6. Removal of the "Lien Fund"

The current Builders' Lien Act defines the "lien fund" as the amount of the statutory holdback plus any amount payable under the contract that has not been paid by the owner. The concept requires the owner to stop the total flow of funds if a lien is registered until it is removed. The "lien fund" is supposed to provide security primarily for the subtrades and suppliers in the event of default by the contractor or a subcontractor.

With a comprehensive trust regime, the primary security of the subtrades and suppliers will be the trust, if the owner is willing and able to pay the contractor. Where the owner is either unwilling or unable to pay the contractor, the primary security will continue to be the lien.

The Task Force felt that an isolated lien, assuming the owner is paying according to his contract, could be dealt with by providing security in the land for the amount of the lien by merely imposing an obligation on the owner either to pay the lienholder if the owner owes money to the contractor or to risk having the lien enforced against the land.

7. The Crown

The position of the Crown under the proposed legislation was not discussed in any detail in the Preliminary Report. It was merely recommended that the Crown should be bound by any new legislation with the obvious caveat that the lien could not be used to sell Crown land on the grounds that the Crown, by definition, honours its contractual obligations.

Under the proposed legislation, the obligations of the Crown, if it is the sole owner, will be virtually identical to those of any other owner who is prepared to honour his contractual obligations.

Further, an attempt has been made to simplify the identification of when the Crown is the owner by allowing a notice to be posted on the project site identifying it as a Crown-owned project. The notice would also specify an address for service.

Chapter Three:

The Statutory Trust

1. Introduction

The imposition of a statutory trust will have a profound effect on the manner in which the construction and oil and gas industries conduct their business. It will transform what would otherwise be debtor - creditor relationships into fiduciary ones where failure to pay accounts will no longer be merely breaches of contract, but rather will become potential breaches of trust. When one considers the legal consequences flowing from a breach of trust, as compared to those flowing from a breach of contract, the potential impact becomes clear.

An unpaid trust beneficiary not only may sue for damages for breach of trust, but also may sue to recover the trust property itself. An officer or director of a corporate trustee who participates or acquiesces in the diversion of trust funds will be personally liable for the breach of trust. In the event of a trustee's bankruptcy, the beneficiary of a trust may claim the identifiable trust funds as his own property and they would not be available to satisfy the bankrupt's liabilities. These civil remedies are in addition to the criminal and provincial penal sanctions which may result from a breach of trust.

2. The Owner's Trust

It is the Task Force's recommendation that an owner should be a trustee of the following funds:

(a) any funds secured by a mortgage or other security and received by or on behalf of the owner for payment of the improvement, including any amount to be used to purchase the land and to pay prior encumbrances;

(b) any funds of the owner that he identifies in writing to the contractor at the time a contract is entered into as funds to be used for payment of the improvement;

(c) subject to a prior claim against the rents, any funds derived by the owner from rental of the land in respect of which the improvement is being made;

(d) any funds received by an owner from other owners that are to be used for payment of the improvement;

(e) where there is a sale by the owner of that owner's interest or estate in the land in respect of which the improvement is being made, the funds that are equal to an amount that is the positive difference, if any, between

(i) the value of the consideration received by the owner as a result of the sale, and

(ii) the reasonable expenses arising from the sale and any amount paid by the owner to discharge any prior registered encumbrance;

(f) any funds that are received by the owner for the owner's minerals or the owner's interest in minerals produced from the land on which the work took place or the materials were furnished, where

(i) work is done or materials are furnished with respect to the recovery of the minerals, and

(ii) money is owing for that work or those materials by the owner to the person who did the work or furnished the materials;

(g) money paid by a landlord to a tenant as a leasehold inducement or a tenant's leasehold improvement allowance; and

(h) any proceeds of insurance that are paid to the owner by reason of damage to, or destruction of, the improvement.

The Task Force also recommends that if an owner identifies in writing property, whether real or personal, from which funds will be derived to pay for the improvement, the identified property should be trust property and the trust rights created under the proposed legislation should be capable of being registered at the appropriate registry office.

It should be noted that in the Preliminary Report, the Task Force recommended that "any funds in the hands of the owner, or received by the owner, for payment of the improvement" should be trust funds. This particular recommendation was viewed by the Task Force, in the light of further comments, as too ambiguous and therefore prone to litigation. The Task Force felt that if a contractor were uncertain about an owner's ability to pay, he should contractually require the owner to identify funds, or a source of funds, from which the costs of the improvement would be paid. This would require the owner and the contractor to address the issue of payment and to deal with it in their contract. It seems reasonable to assume that many standard form contracts would include such a provision. If an owner has the stronger bargaining position, however, it is doubtful that he will agree to impose trust obligations on himself through the identification of funds as trust funds.

It should be further noted that where there are multiple owners, and one owner receives funds from the other owners for payment of the improvement, he is a trustee with respect to those funds for the amount owed to the contractor, whether or not he identifies the source of funds to the contractor. This provision is particularly important in the oil and gas industry, where multiple owners seem to be the rule rather than the exception.

With respect to tenants, it seems only reasonable that leasehold inducement payments and tenant improvement allowances should be trust funds for the benefit of the contractor since that is the very purpose of granting them in the first place.

3. The Contractor's and Subcontractor's Trust

When a contractor or a subcontractor receives payment on account of the contract, to the extent that he owes money to those who provided work or materials to the improvement, he holds that money in trust for their benefit. All the contractor's, or subcontractor's, accounts receivable are held in trust on the same basis.

That is, to the extent that a contractor or a subcontractor owes money, money which is received on account of the contract or a subcontract is trust money and cannot be used for any purpose other than paying beneficiaries. However, to the extent that a contractor receives funds that are not reflected as amounts owing because, for example, they have not yet been invoiced, he may use those funds for his own purposes.

4. Consideration Other Than Money

It is the view of the Task Force that if a contractor chooses to work for consideration other than money, he should become a trustee for all money owing to subcontractors, unless the subcontractors agree to work for consideration other than money or on a contingency basis as well. However, where an insignificant part of the contract is consideration other than money, the trust obligation should not be imposed. In other words, where a significant part of the consideration of a contract is other than money, the contractor is deemed to have received trust funds in the amount that is equal to the total sum owing to the contractor's beneficiaries. This will require the contractor to apprise the subtrades of the risk and to negotiate for subcontracts other than money or become a trustee for the full amount of funds owing to subcontractors with all the liability which that may entail. The same principle applies to subcontractors who choose to work for consideration other than money.

5. Funds Advanced, or Borrowed and Advanced, by a Trustee

If a trustee uses his own funds, or borrows funds, to pay a beneficiary in respect of a contract or subcontract, fairness dictates that he should be able to repay himself, or his lender, from funds which he receives which otherwise would be trust funds in respect of the same contract or subcontract. This should allow contractors to continue to pledge their receivables to the bank as security, as long as they use the borrowed funds to pay beneficiaries.

In such circumstances, that is, where accounts receivable have been pledged as security, the bank may want to satisfy itself that cheques going through the contractor's account are payable to beneficiaries. When the receivables are ultimately received, they need not flow into the trust account but can flow directly into the contractor's general account to repay the bank or, if the bank has been repaid, can remain in the general account as operating capital for other jobs.

Chapter Four:

The Consolidated Trust Account

The Task Force recommends that contractors and subcontractors should be statutorily required to maintain, in Alberta, a consolidated trust account for funds paid on account of contracts under which liens might arise. The rationale for such a legislative requirement, which is not found in the other provinces which impose a statutory trust, is that if trust funds can be commingled with general revenues, the statutory trust alone will not ensure that any funds will remain in the contractor's, or subcontractor's, bank account if insolvency were ultimately to occur. This recommendation initially caused some apprehension, due mainly to a lack of understanding about the way in which the Task Force envisaged the operation of the consolidated trust account.

The apprehension was that trust funds would be frozen in the consolidated trust account until every account with respect to a particular project was fully paid. Under this view, a contractor or subcontractor would not be able to withdraw funds for his own overhead or for his own profit. This would have caused financial hardship, particularly on projects which extend over a lengthy time period.

The Task Force is of the view that the operation of the consolidated trust account must be reasonably compatible with the legitimate operation of the contractor's, or subcontractor's, business. In the first instance, all money received on account of a contract, if trust money, must be placed in the consolidated trust account. (It will be recalled that the use of one's own money or money borrowed to pay beneficiaries is not subject to the trust). Not to do so would, in and of itself, amount to a breach of trust. Second, to the extent that there is money owing, whether due or not, on that contract, the deposited money must be retained in the trust account and ultimately applied to the payment of those accounts when payable. However, when there is a positive balance in the consolidated trust account representing the difference between the balance in the account and amounts owing, whether due or not, to beneficiaries with respect to that contract, that balance may be withdrawn by the contractor or subcontractor for his use. It should be noted that employees who perform services with respect to the improvement are also beneficiaries under the trust and to that extent, "overhead" is payable from trust funds.

This method of operating the consolidated trust is, in the view of the Task Force, a realistic and practical compromise between the commingling of trust funds with general revenues on the one hand and freezing the trust funds until all accounts are fully paid on the other. It places an onus on contractors and subcontractors to be aware of the state of their accounts payable, an onus which is neither unreasonable nor unmanageable. This obligation will force the industry to adopt better accounting practices and should in the long run result in fewer business failures. The Task Force repeatedly heard that many contractors and subcontractors keep their accounts on the back of a book of matches. While this is no doubt an overstatement, some variation of it probably does reflect the practice in much of the industry. However, with the introduction of a comprehensive trust regime, some minimum accounting standards will be necessary. The Task Force concedes that this will cause those contractors and subcontractors, who at the present time operate without bookkeeping assistance, either to develop or to hire bookkeeping services and thereby increase their cost of doing business, but, in the view of the Task Force, this is a legitimate cost of doing business and should not affect competition since it is a requirement of general application throughout the industry.

Chapter Five:

Elimination of the Statutory Holdback

The Builders' Lien Act imposes an obligation on the owner to retain 15% of the value of the work actually done and materials actually furnished when making a payment on the contract. Although the rationale for a statutory holdback is to provide a sum of money which will be available to at least partially satisfy lien claimants, in fact it is not a specific pool of money but is rather a notional concept which only comes into being in the event that the owner decides to pay it into court in order to clear his title of liens.

While every province has a statutory holdback, the historical trend has been a continuing reduction of its amount. At the present time, the holdback is 10% in Ontario, Saskatchewan and British Columbia and 7 1/2% in Manitoba. Yet, if the protection of lien claimants were paramount, logic would dictate that the percentage of funds to be retained as a holdback should be increased.

The reality, however, is that the statutory holdback of 15% causes a serious deficiency in the cash flow of contractors and subcontractors, which may contribute to insolvencies and business failures. That is, rather than being part of the solution, in some cases the statutory holdback is part of the problem. This is compounded by the position in which lien claimants often find themselves when there are prior mortgages on the land. Not only will the mortgage advances generally rank ahead of the lien claims, but also interest accumulated on the mortgage arrears will have priority. Thus, it is a rare occurrence when a lien claimant will have the security of the 15% holdback in the event of the owner's default.

It should be noted that the elimination of the statutory holdback is not without possible negative consequences. The present Builders' Lien Act provides that the owner may not use the statutory holdback to complete the contract in the event that the contractor or a subcontractor defaults in completing his contract. However, with the elimination of the statutory holdback, the owner will be able to set off a counterclaim against the contractor against the whole amount owing to the contractor. Thus, elimination may result in lien claims with less value than exist under the current legislation.

The Task Force did consider reduction of the holdback to 10% but ultimately concluded that, on balance, the advantages of its elimination as a statutory requirement were far greater than those favouring its retention, even at a reduced rate. With statutory trust provisions providing greater insulation against unwarranted diversion of contract money, and registration providing greater long-term assurance that repeated breaches of trust by the same person or corporate entity would not occur, the Task Force unanimously felt that the statutory holdback could be eliminated without any significant loss of security.

Chapter Six:

The "Stop Notice"

In its Preliminary Report, the Task Force proposed implementation of a new remedy, to be known as a "Stop Notice", which would be in addition to, rather than an alternative for, the present lien remedy. The substance of this new remedy was that a subcontractor or supplier could stop money in the owner's hands by serving him with a Stop Notice, rather than by registering a lien which by necessity encumbers the owner's land title and gets him immediately involved in the judicial process. These features of the lien remedy appeared unfair to an owner who was paying his contractor and who was clearly solvent.

Although most subcontractors and suppliers seemed to favour the Stop Notice, owners, contractors and their lawyers all pointed to the additional level of complexity which it would introduce into the system. Interestingly enough, the Task Force arrived at this conclusion independently as it was preparing the draft legislation which accompanies this Final Report. It was never possible to make the lien and the Stop Notice work together compatibly. As long as the option to serve a Stop Notice or register a lien, or do both, remained open, it was impossible to escape a multitude of different actions, all over virtually the same money. Further, the Task Force concluded that some solicitors would take advantage of all available options out of an abundance of caution and, as a result, the owner would not only continue to have liens registered against his land title, but also would be served with Stop Notices.

As for the ability of the Stop Notice to pursue trust funds in the hands of the owner, the Task Force concluded that the Stop Notice was unnecessary in order to achieve this result. If the owner identifies, in writing to the contractor, funds that are to be used for payment of the improvement, those funds constitute trust funds for the benefit of the contractor. If the owner fails to pay those funds to the contractor, the contractor may sue for breach of trust, quite independently of the existence or non-existence of the Stop Notice.

The Task Force concluded that the lien and the Stop Notice would result in an irreconcilable and confusing proliferation of remedies and therefore the recommendation of a "Stop Notice" remedy has been dropped.

Chapter Seven:

Liens

The Task Force continues to recommend retention of the lien for all those who now have lien rights. The ability to enforce the lien against the owner's land is the remedy of contractors and subcontractors when the owner is either unwilling or unable to pay in accordance with the requirements of the contract.

The Task Force has concluded that much of the problem with the present lien provisions, and which the Stop Notice attempted to address, lies in the concept of the "lien fund" in which the registration of a single lien completely brings the flow of funds to a halt. In Red Deer College v. W. W. Construction (Lethbridge) Ltd. et al. (1989), 56 D.L.R. (4th) 204, Mr. Justice Bracco, writing for the Alberta Court of Appeal, explained the operation of the "lien fund" concept in the following manner:

> "...the lien fund is comprised of two components, the 15 per cent holdback and any sum payable under the contract which has not been paid by the owner in good faith. By its very nature the 15 per cent holdback is the amount held in the hand of the owner. If...the owner were to continue to pay to the contractor those amounts payable to the contractor less the 15 per cent holdback, the owner could not comply with the two component definition of the lien fund. He could face the risk of having to pay double." (at page 207)

Thus it can easily be seen why one of the greatest annoyances with the present legislation is the isolated lien and the complete stoppage of the flow of funds which its registration causes. When a single lien can shut off project financing in total, greater problems may be created than are solved. There is little, if any, justification for such a harsh result. Any construction project, regardless of its size, depends upon a steady flow of funds for its health.

It is the Task Force's recommendation not to impose an obligation on the owner to hold back any funds but instead to create a priority for the lien at the time it is registered with respect to mortgage advances, as is now the case, and, in addition, to create an obligation on the owner to pay the lien claimant, assuming money is owing under the contract, or risk having the lien enforced against the land. Of course, the owner would have the ability to pay the money into court in order to have the lien discharged. Most likely, the owner will retain the amount of the lien claim from the contractor and it is similarly most likely that a mortgagee will hold back from any advance the amount of the lien claim.

Under normal circumstances, these new provisions should allow money to continue flowing through the contractor to subcontractors and suppliers, while the owner, the contractor and the lien claimant attempt to solve the problem which gave rise to the lien. If the owner is paying, the new provisions do not prejudice the lien claimant. If the owner is in default, the concept of the "lien fund" is not relevant in any event since the lien will be enforced against the land.

It is the view of the Task Force that this system provides a reasonable compromise between the present "lien fund", which freezes all contract payments on registration of a single lien and the "Stop Notice", which would have permitted continued financing if the owner retained the amount claimed in the Stop Notice, without the necessity of registering a lien at all. It incorporates the best of both remedies without the irreconcilable differences which would have arisen had both remedies been available. Under the proposed system, the registration of a lien will allow the lien claimant to sell the owner's interest in the land if the owner is either unwilling or unable to pay the contractor, as it does now, but has the advantage of allowing the continuation of normal construction financing in the face of registered liens.

Chapter Eight:

Delegated Regulation

One of the most common complaints about elements of the construction industry is the ease and frequency with which some contractors and subcontractors, operating as a corporation, who have become insolvent or bankrupt, leaving behind a trail of bad debts, resurface under a new corporate umbrella and continue on as if nothing has happened. Under the present legislative regime, where entry into and out of the industry is not regulated, this can occur with impunity because the law does not prevent an insolvent or bankrupt contractor or subcontractor from operating a new corporate entity in the same industry.

Contractors and subcontractors, who have little or no aversion to operating in this manner, can bid and take jobs without due regard to the profitability of the job since they live on cash flow instead of the job's profit margin. The argument, sometimes made, that competition by such contractors and subcontractors is good for the consumer is specious at best. There is already significant competition in all parts of the construction industry and margins are not unreasonably high. Those contractors and subcontractors who are indifferent about the solvency of their corporate entity transfer real costs to subtrades who remain unpaid and to consumers who are left with incomplete work.

The legislation being proposed by the Task Force contemplates that contractors and subcontractors should live on their profits, or a legitimate line of credit, not from the cash flow that is earned by, and owed to, others. Trust money must be paid to beneficiaries and, as a result, trustees must live on their profits, their own capital, or a legitimate line of credit. It is not the intention of the proposed legislation, however, to prevent a person, who conducts business honestly and still becomes insolvent, from continuing under a different corporate entity. It is only those who wrongfully convert trust funds who will be precluded from continuing to function in the industry.

The mandatory registration scheme being proposed by the Task Force is one of "delegated" regulation in which the provincial government delegates, by statute, its regulatory authority to industry. In effect, it amounts to a partnership between government and industry in which government grants operative regulatory authority to industry.

The Task Force recommends that persons who already function in the construction and oil and gas industries should continue to do so. That is, any legislated conditions precedent to registration should be minimal. In order to be registered, the Task Force recommends that an applicant should have to pass a simple test demonstrating an elementary understanding of trust obligations and of the necessity of maintaining and operating a consolidated trust account.

In its Preliminary Report, the Task Force recommended that, in order to be registered, a contractor or subcontractor should be required to post a $25,000 bond to support and guarantee the obligations imposed by the proposed legislation. However, concern has since been expressed that this bonding requirement would prevent some contractors and subcontractors from continuing in the industry. The Task Force was initially under the impression that bonding would act as a screening mechanism to ensure that those contractors and subcontractors who were registered had met some level of honesty and minimal financial integrity. The Task Force is now advised that such is not the case and that any person who has security for the amount of the bond would obtain it whether or not they had been involved in prior breaches of trust. As a result, the Task Force is no longer recommending that bonding be a condition precedent to obtaining registration. The Task Force does recommend that industry should implement some type of levy to at least partially offset losses on account of a breach of trust by a registered member. This would be in addition to the annual fees payable to fund the administration of this delegated regulatory scheme.

The Construction Payment Act contemplates the establishment of a Construction Registration Board consisting of no more than thirteen persons appointed by the Minister according to the following formula:

(a) 2 persons nominated by the Alberta Construction Association;

(b) 1 person nominated by the Alberta Home Builders' Association;

(c) 1 person nominated by the Urban Development Institute;

(d) 1 person nominated by the Petroleum Services Association of Canada;

(e) 1 person nominated by the Canadian Association of Oilwell Drilling Contractors;

(f) 1 person nominated by the Small Explorers and Producers Association of Canada;

(g) 1 person who is an architect nominated by the Alberta Association of Architects; and

(h) 1 person who is a professional engineer and is nominated by that organization having authority to register consulting engineers whose main business is related to the construction industry.

This leaves the possibility of the appointment by the Minister of four representatives from the public-at-large, one of whom should be appointed to represent subtrades.

The Construction Registration Board will then appoint:

(a) a subcommittee to administer the residential building sector;

(b) a subcommittee to administer the commercial and industrial building sector; and

(c) a subcommittee to administer the sector engaged in the exploration and production of mineral resources.

Subcommittees will consist of no more than six members, at least one of whom is a member of the parent Construction Registration Board.

Loss of registration would only occur when the Board or subcommittee was persuaded that the registered member had committed a breach of trust or was in serious breach of applicable regulations. Initially, the Task Force was of the view that only a conviction or a civil judgment for breach of trust would be sufficient to suspend or revoke a member's registration. However, it is now the view of the Task Force that this requirement would be too stringent and that evidence, on a balance of probabilities, of a breach of trust should be sufficient to suspend or revoke registration. Of course, either a conviction or a civil judgment for breach of trust would be the best evidence.

An appeal procedure is contemplated when the Board or subcommittees function as quasi-judicial bodies. It is envisaged that they would function much like any other professional body when their decisions affect the ability of a member to pursue his or her chosen profession or occupation.

Registration is viewed by the Task Force as the best enforcement mechanism for the trust. While the civil and criminal consequences may be serious deterrents to a breach of trust, expulsion from the very industry upon which one is dependent for a livelihood is the strongest deterrent available.

Chapter Nine:

Public Reaction to the Preliminary Report

1. Introduction

It has been said by economists that "construction" more properly describes a sector of the economy, rather than an industry. With this in mind, it would have been highly unlikely that, in such a large, non-homogeneous and broadly based sector of the economy as construction, the Task Force's preliminary recommendations would have been received without comment or criticism.

Generally, the reaction of those who commented on the Preliminary Report was favourable:

> "We commend you on your recommendations as contained in the report dated September/88. We hope that with these recommendations implemented that the flow of funds in the construction industry will be improved and that it will result in better business practices." (letter from the Edmonton Steel Fabricators Association to Counsel dated November 14, 1988)

> "The proposed changes outlined by the Task Force represent a marked change in the approach to assurance of payment within the construction industry. We compliment the Task Force for introducing fresh thinking!" (letter from the Alberta Ready-Mixed Concrete Association to Counsel dated November 21, 1988)

> "The Alberta Construction Association supports the Task Force in its stated goal of amending the Builders' Lien Act to achieve greater assurance of payment to contributors to a construction project." (Response of the Alberta Construction Association dated December 5, 1988)

> "CEA endorses in its entirety, the Preliminary Report..." (letter from the Consulting Engineers of Alberta to Counsel dated December 19, 1988)

> "It is our wish at this time to register a vote of encouragement and support to the proposed changes to the Builders' Lien Act. Be assured that our Association has studied and discussed these proposals and feel confident that they will add some much needed financial stability to the Construction Industry." (letter from the Alberta Floor Covering Association to Counsel dated February 21, 1989)

> "The Board of Directors of the CAODC has reviewed the Report and, on the whole, believes it is a major improvement over the present legislation." (Canadian Association of Oilwell Drilling Contractors Presentation to the Task Force dated November 9, 1988)

> "Generally speaking, IPAC considers the changes proposed in the Preliminary Report to be significant improvements to the Builders' Lien Act." (Submission of the Independent Petroleum Association of Canada to the Task Force dated January, 1989)

As expected, some concerns were expressed with respect to many of the recommendations. However, many of those concerns, upon closer examination, turned out to be more a misunderstanding of the particular Task Force recommendation in question than a difference in point of view. It is fair to say that the only substantial opposition to the recommendations of the Task Force came from the Alberta Home Builders' Association. The crux of that opposition and its resolution is discussed as a separate item in this chapter.

2. Elimination of the Statutory Holdback

While one might have reasonably expected some adverse reaction from subcontractors and suppliers to the Task Force's recommendation to eliminate the statutory holdback, none was forthcoming. It would appear that subcontractors and suppliers feel that the increased cash flow which should result from its elimination, when taken in conjunction with the Task Force's recommendation of a comprehensive trust regime, provides greater assurance of payment of more money than exists under the present legislative regime. It must be remembered that the default of a contractor or a subcontractor is a rare, albeit disruptive, occurrence; most projects are, after all, healthy ones where payment is the rule rather than the exception. Coupled with the very limited recovery that the statutory holdback now provides in the event of default, its elimination can only be seen as an advantage by those from whom that amount is at the present time withheld.

3. The Statutory Trust

Not surprisingly, the recommendation of a statutory trust evoked a somewhat greater response and again most of it was favourable.

A sampling of the favourable responses follows:

> "Insurance Bureau of Canada, as the voice of Surety in Canada applauds the recommendation of the Task Force that the Builders' Lien Act be amended to impose strict and meaningful trust obligations upon contractors as they handle funds flowing down the construction pyramid. The recommendation that these contractors keep the trust monies in a consolidated trust account separate from their general revenues will have the effect of making the trust real. Beneficiaries of these trusts will have the certainty that the trust money will be available to them and will not go to pay the lender of the contractor." (letter from Insurance Bureau of Canada to Counsel dated November 14, 1988)

> "Implementation of comprehensive trust provisions to insure the proper movement of funds from the owner/financier through the contractor/sub-contractor chain to the supplier, should certainly be adopted. Absolutely no exceptions should be considered to this provision." (letter from the Alberta Ready-Mixed Concrete Association to Counsel dated November 21, 1988)

> "The Association has carefully studied the proposed recommendations in respect of a statutory trust obligation on any party to a construction contract who receives monies on behalf of another party down the contractual chain. We believe such trust provisions will greatly inhibit abuses and diversions of contract funds and thus enhance the assurance of payment to all contributors." (Response of the Alberta Construction Association dated December 5, 1988)

"We commend the Task Force for its perceptive recommendations which will correct the deficiencies of the current legislation, e.g.: ... - the trust fund concept should ensure that sub-consultants are paid..." (letter from Consulting Engineers of Alberta to Counsel dated 19 Dec. 88)

"The CAODC is also supportive of your recommendation that statutory trusts be established as a separate and independent means of ensuring payment. This remedy...will create a more positive business climate for both operators and contractors." (Canadian Association of Oilwell Drilling Contractors Presentation to the Task Force dated November 9, 1988)

4. Registration

In its Preliminary Report, the Task Force unanimously recommended that all contractors and subcontractors who, in their ordinary course of business handle trust funds, should be registered. As far as the Task Force has been able to determine, this would be the first time that a registration scheme for the construction industry would have been implemented in Canada. The only report which considered the idea was that of the Manitoba Law Reform Commission, which rejected the "extreme alternative of requiring the licensing of all builders in the province", preferring to rely on "minimum accounting requirements" as the legislation's principal enforcement mechanism and then giving industry "the fullest opportunity to police itself." (at page 22)

In the Task Force's view, the scheme of "delegated regulation" which it is recommending will best serve the public interest by allowing industry to police itself under the auspices of the province's ultimate regulatory authority. Nevertheless, the Task Force expected that there would be some resistance to the concept of registration, even in the "delegated regulation" sense. It was the position of the Task Force that if industry chose not to support the concept of delegated regulation, it would not make the recommendation to government.

However, industry generally supported the recommendation for registration:

"To institute registration of contractors, at first seemed to be a mammoth undertaking coupled with an 'administrative nightmare.' However, after substantial discussion it is felt this too should be incorporated in the proposed legislation." (letter from Alberta Ready-Mixed Concrete Association to Counsel dated November 21, 1988)

"...the concept of registration for contracting firms involved directly with the administration of liens is an excellent idea..." (letter from The Alberta Association of Architects to Counsel dated November 29, 1988)

"The threat of business discontinuance in Alberta by loss of license for violation of trust obligations has potentially more impact than the threat of court imposed sanctions. We believe licensing or registration is vital to the success of amended lien legislation, and the Association fully supports this initiative provided the Task Force can introduce the provision in such a manner as to ensure total control by industry and removal of any threat of restricting entry to the industry by any eligible person." (Response of the Alberta Construction Association dated December 5, 1988)

5. The Alberta Home Builders' Association ("the AHBA")

(A) Introduction

Although the AHBA supported the Task Force recommendations with respect to the lien, it initially opposed the trust and registration recommendations in their entirety. As the Task Force considered unanimity an important value if eventual legislative implementation of its proposals were to be achieved, it entered into discussion with the AHBA with a view to resolving any differences but without compromising the fundamental principles which formed the foundation of its Preliminary Report.

The membership of AHBA is diverse and as a result so are the business practices of its members. The Task Force was advised that some home builders, who act as their own contractors, rely relatively little on bank financing for working capital but rather use cash flow received from buyers as financing to expand their business such as buying lots for future development or building showhomes. In other words, if the buyer pays a deposit or a bank advances on a builder's mortgage, some builders apparently do not pay the subtrades for up to ninety days. The cash flow generated in such a manner becomes their working capital. It was pointed out that the need to use this method of financing in an expanding market is even more crucial since banks will often not increase lending for operating lines if the underlying assets of the builder have not increased.

It seems clear to the Task Force that this method of financing creates a significant risk to subcontractors and suppliers. It is a virtual certainty that when the business cycle reverses and house construction is reduced, some home builders will be unable to pay their debts. This phenomena has been demonstrated only too frequently in the past.

(B) AHBA Opposition to the Trust Concept

In its "Response" to the Preliminary Report dated December 15, 1988, the AHBA found "seven major reasons why the concept of comprehensive trust is not a practical solution to meeting the need for assurance of payment." These reasons may be summarized as follows:

(a) imposing trust conditions on the construction industry exposes "the directors, officers, or agents, of the Contracting Company" to personal liability. That is, they lose their protection of limited liability through incorporation;

(b) banks will change their lending practices to the detriment of the average home builder's cash flow;

(c) comprehensive trust provisions are difficult to administer on numerous simultaneous construction projects as is normal in the residential housing industry;

(d) contract law is a sufficient remedy in the building industry and the "higher obligation" imposed on it through trust provisions is unnecessary;

(e) trust provisions will eliminate not only the unethical operator but also the honest builder, even where good building practices are followed;

(f) the residential construction industry in Alberta has never had comprehensive trust provisions; and

(g) trust provisions in the other provinces work although "direct discussion with builders in each of these Provinces reveals that none follow the Comprehensive Trust Fund Provision, nor could they and remain in business if the provisions were strictly enforced by government."

As pointed out in the Preliminary Report, the construction industry in Manitoba has been subject to a statutory trust since 1932, in Ontario since 1942, in British Columbia since 1948 and in Saskatchewan since 1973. The imposition of a statutory trust is an attempt to see that those who add value to an improvement in the way of labour and materials get paid. The trust provides certain remedies to those who are not paid and the severity of those remedies, it is hoped, will act as an impetus to the timely and orderly payment of accounts by contractors and subcontractors. However, the existence of trust conditions has no influence upon the level of building activity undertaken, which will fluctuate according to demand. That is, as an economic factor, trust conditions are neutral in that they neither encourage nor discourage construction. Building trends in those provinces with a statutory trust bear this out.

The argument that a statutory trust will dry up available credit, since accounts receivable will no longer be able to be pledged as security for a general operating line of credit unless used to pay beneficiaries, has been considered, and obviously rejected, by those provinces with it.

Although Buchanan concluded in 1967 that the existence of trust provisions caused banks to tighten their "flow of credit", often leading to credit applicants having to borrow elsewhere "at exorbitant interest rates", the Manitoba Law Reform Commission in 1979 found

> "no evidence ... showing that the trust provisions increase the difficulties of builders in obtaining credit from financial institutions." (at p. 21)

In 1972, the Law Reform Commission of British Columbia had made the point that

> "care must be taken to ensure that the operation of the trust is not made so rigid that a statutory trustee can never obtain finance because the incidence of the trust makes the risk of lending to him too great." (at p. 97)

As a result, it recommended that

> "where a person lends money for the financing of a particular building project and receives an assignment from the borrower of contract moneys payable or to become payable to the borrower, the lender should be entitled to retain those contract moneys, up to an amount equal to the sum lent for the purpose of the particular project, in priority to the trust beneficiaries." (at p. 97)

The Ontario statute at that time contained a similar provision and continues to do so, as do the statutes of Manitoba and Saskatchewan. This type of provision is included in the legislation being proposed by the Task Force. Accounts receivable can still be pledged as credit, as long as the proceeds of the loan are used to pay beneficiaries of the trust.

From a common sense point of view, it would be unrealistic, even under the present legislative regime in Alberta, to believe that banks lend on the basis of accounts receivable without taking into account the borrower's accounts payable and other assets. The Task Force was informed that most of the major banks lend money to the construction industry in Alberta as if it operated under the same trust regime in effect in the other provinces. This was confirmed by representatives from various banks, including a representative from the Treasury Branch. The Canadian Bankers Association confirmed that the recommendations of the Task Force should not reduce the availability of credit to the industry.

It is therefore the conclusion of the Task Force that the presence of trust provisions in the construction industry, given the ability to borrow to pay beneficiaries and then use receivables to repay the loan, will not adversely affect the availability of credit. There is no evidence available, either historically in the financing experience in those jurisdictions with a statutory trust or even anecdotally in the opinion of those familiar with lending practices, not only in Alberta but also throughout Canada, to suggest that it will. In fact, it may well be that greater credit availability will result under the legislation being proposed by the Task Force since, under the present Builders' Lien Act, the 15% statutory holdback cannot be used as security for a loan, whereas under the proposed legislation, with the elimination of the statutory holdback, no such impediment will exist.

If the recommendations of the Task Force are accepted, it is true that builders will no longer be able to expand or finance their operations with money that should be paid to subcontractors. The suggestion, which was made to the Task Force, that subcontractors and suppliers have a risk financing role in some builders' operations might come as somewhat of a surprise to those subcontractors and suppliers who, not unreasonably, have viewed themselves as providing only labour and materials. The very purpose for the creation of the Task Force was to try to find ways to provide greater assurance of payment for subcontractors and suppliers and to prevent the abuses which now sometimes occur.

In summary, the Task Force has not been persuaded that contract funds should be used for purposes other than the payment of those who provided labour and materials.

(C) AHBA Opposition to Registration

In its "Response" to the Task Force dated December 15, 1988, the AHBA expressed its opposition to registration in the following manner:

> "In approaching the matter of registration one observes that the Industry, as a whole, has addressed the issue of standards by establishing a Code of Ethics; agreement to which is a condition of membership for all members. Contractors who wish to build under the seal of the New Home Warranty Program have a number of additional requirements that have to be met. It is evident, then, that the Industry is demonstrating a significant level of self regulation and does not require outside intervention to ensure that this continues. Accordingly, the AHBA does not support the inclusion of a Registration clause in the Builders' Lien Act."

The AHBA reiterated its opposition to registration in a letter to the Chairman dated April 14, 1989 in the following manner:

> "With respect to..."Registration", it is the majority consencus (sic) of our membership that Registration should not be the subject matter of a Builders' Lien Act. The overall effect...is to subject the home building industry to government regulations by a bureaucratic process of non-peers and governmental agencies."

In residential construction, buyers of new homes, many of whom are buying their first house, can ill afford the added expense, let alone the aggravation, associated with the financial collapse of a home builder. Consumer protection requires that home builders not speculate with the funds being provided for the purchase of a new home, which, after all, is usually the single most costly purchase that people will undertake. Only registration will ensure such a result and therefore the Task Force has concluded that new home builders must be brought within the ambit of the registration provisions of the proposed Construction Payment Act.

(D) Resolution of Issues with AHBA

The Chairman and Counsel and various members of the Task Force met with members of the AHBA and the executive of the New Home Warranty Program on numerous occasions with a view to arriving at a reasonable compromise, if such were at all possible. The AHBA and the New Home Warranty Program had always indicated a strong interest in self-regulation of its industry. Such self-regulation was always to include better consumer protection and greater assurance of payment to subcontractors and suppliers. It appeared, therefore, that part of the opposition to the Task Force's proposals stemmed from the strong preference by the industry for self-regulation.

Since the AHBA and the New Home Warranty Program endorsed the goals of better consumer protection and greater assurance of payment for subtrades and suppliers, a compromise appeared possible and was ultimately attained. The Task Force agreed to add a provision to the proposed Construction Payment Act that would allow the Minister to declare that the trust provisions and registration requirements would not be applicable to members of the AHBA if it develops a program or scheme that protects the home buyer, subtrades and suppliers as well or better than the proposed Construction Payment Act and if the Minister approves such a program or scheme.

The AHBA has agreed, by way of letter to the Chairman dated July 25, 1989 to support, or at least not to oppose, the proposed Construction Payment Act after it is submitted to the government. Since the objectives of the AHBA and those of the Task Force are similar, although the means are different, the Task Force felt that its own principles would not be compromised by accommodating the request of the AHBA.

Chapter Ten:

The Proposed Construction Payment Act

As the Task Force has stated many times, its primary objective throughout its deliberations has been the achievement of providing a greater assurance of payment for subtrades and suppliers than is available at the present time under the current Builders' Lien Act. It is the Task Force's opinion that its proposed Construction Payment Act will, if implemented by the government, significantly improve the position of those in the construction and oil and gas industries who have lien rights. Not only will the industries themselves be strengthened through a more reliable and larger cash flow and a greater assurance of payment for subtrades and suppliers, but also in the residential housing sector there should be better protection for the new home purchaser. With greater assurance that subcontractors and suppliers will be paid, the frequency of builder insolvency should be reduced.

In the view of the Task Force, the proposed legislation which follows is a marked improvement over the current Builders' Lien Act in the achievement of the Task Force's objective of providing greater assurance of payment.

Construction Payment Act

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "contract" means the contract between an owner and a contractor and includes an amendment to the contract;

(b) "contractor" means a person contracting with or employed directly by an owner or his agent to do work on or to furnish materials for an improvement, but does not include a labourer;

(c) "Court" means the Court of Queen's Bench;

(d) "Crown" means the Crown in right of Alberta and includes

(i) any agent of the Crown, and

(ii) any entity, other than an agent of the Crown, or project that is designated by regulation as an entity or project to which Part 3 applies;

(e) "improvement" means anything

(i) constructed, erected, built, placed, dug, drilled or demolished on or in land, or

(ii) intended to be constructed, erected, built, placed, dug, drilled or demolished on or in land,

but does not include a thing that is neither affixed to the land nor intended to be or become part of the land;

(f) "labourer" means a person employed for wages in any kind of labour whether employed under a contract of service or not;

(g) "land" means land as defined in the *Land Titles Act;*

(h) "lien" means a lien referred to in section 35;

(i) "lienholder" means a person who has a lien arising under Part 2;

(j) "owing" means due whether payable or not;

(k) "owner" means a person having an estate or interest in land

(i) at whose request, express or implied, and

(ii) on whose credit, on whose behalf, with whose privity and consent or for whose direct benefit,

work is done on or materials are furnished for an improvement to the land, whether or not there is any dealing or contractual relationship in respect of that work or those materials between the person having the estate or interest in the land and the person who does the work or furnishes the materials and includes all persons

(iii) who are claiming under the person who has the estate or interest in the land, and

(iv) whose rights are acquired after the commencement of the work or the furnishing of the materials;

(l) "prescribed" means prescribed by the regulations;

(m) "registered" means registered under the *Land Titles Act;*

(n) "registered lienholder" means a lienholder who has registered a statement of lien in the appropriate land titles office and includes a lienholder who has registered a statement of lien that has been removed pursuant to section 67;

(o) "Registrar" means a Registrar of Land Titles;

(p) "subcontract" means an agreement between

(i) the contractor and a subcontractor,

(ii) 2 or more subcontractors,

(iii) the contractor and a person engaged only in furnishing materials or only in the performance of services, or

(iv) one or more subcontractors and one or more persons engaged only in furnishing materials or only in the performance of services

relating to the provision of work or furnishing of materials in respect of an improvement;

(q) "subcontractor" means a person other than

(i) a labourer,

(ii) a person engaged only in furnishing materials,

(iii) a person engaged only in the performance of services, or

(iv) a contractor,

who performs work on or furnishes materials in respect of an improvement;

(r) "trust" means a trust created under Part 1;

(s) "trustee", other than in section 77, means a trustee under Part 1;

(t) "wages" means the money earned by an individual for work done by time or as piece work, and includes all monetary supplementary benefits, whether provided for by a statute, a contract or a collective bargaining agreement;

(u) "work" includes the performance of services.

Application of Act

2(1) Except as otherwise provided for in this Act, this Act applies to the Crown in right of Alberta.

(2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of Alberta with respect to minerals that are owned by the Crown in right of Alberta except where the Crown in right of Alberta enters into a contract with a person for the express purpose of producing the Crown's own minerals.

Work and materials re minerals

3 For the purposes of this Act, any work done or materials furnished

(a) preparatory to,

(b) in connection with, or

(c) for an abandonment operation in connection with,

the recovery of minerals is deemed to be work done or materials furnished in respect of an improvement.

Waiver

4(1) An agreement by any person that

(a) this Act does not apply, or

(b) the remedies provided by this Act are not available for his benefit,

is against public policy and void.

(2) A release referred to in section 123(c) shall not be construed to be an agreement referred to in subsection (1).

Furnishing material

5(1) Materials shall be considered to be furnished within the meaning of this Act when they are delivered either

(a) on the land on which they are to be used, or

(b) to a place in the immediate vicinity of the land on which they are to be used as is designated by the owner or by the contractor or subcontractor.

(2) Notwithstanding that materials to be used in an improvement may not have been delivered in strict accordance with subsection (1), if the materials are incorporated in the improvement the person furnishing the materials

(a) has furnished materials for use in or in respect of an improvement for the purposes of this Act, and

(b) has a lien as set out in Part 2.

Rented equipment

6 For the purposes of this Act, a person who rents equipment to an owner, contractor or subcontractor

(a) shall, while the equipment is on the contract site or in the immediate vicinity of the contract site, be deemed to have performed a service, and

(b) has a lien under Part 2 for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

Agents

7 Nothing in this Act shall be construed so as to prevent a person who has a right, benefit or obligation under this Act from acting through an agent.

PART 1
PAYMENT FOR WORK AND MATERIALS

Division 1
Trust Funds

Owner's trust

8(1) The following constitutes a trust fund for the benefit of the contractor:

(a) any funds secured by a mortgage or other security and received by or on behalf of the owner for payment of the improvement, including any amount to be used to purchase the land and to pay prior encumbrances;

(b) any funds of the owner that he identifies in writing to the contractor at the time that a contract is entered into as funds to be used for payment of the improvement;

(c) subject to a prior claim against the rents, any funds derived by the owner from rental of the land in respect of which the improvement is being made;

(d) any funds received by an owner from other owners that are to be used for the payment of the improvement;

(e) where there is a sale by the owner of that owner's interest or estate in the land in respect of which the improvement is being made, the funds that are equal to an amount that is the positive difference, if any, between

(i) the value of the consideration received by the owner as a result of the sale, and

(ii) the reasonable expenses arising from the sale and any amount paid by the owner to discharge any prior registered encumbrance;

(f) any funds that are received by the owner for the owner's minerals or the owner's interest in minerals that are produced from the land on which the work took place or the materials were furnished, where

(i) work is done or materials are furnished with respect to the recovery of the minerals, and

(ii) money is owing for that work or those materials by the owner to the person who did the work or furnished the materials;

(g) money paid by a landlord to a tenant for the purpose of

(i) inducing the tenant to enter into a lease, or

(ii) assisting the tenant to make improvements in respect of the tenant's leasehold estate;

(h) subject to section 46, any proceeds of insurance that are paid to the owner by reason of the improvement being destroyed or damaged.

(2) Where at the time that a contract is entered into an owner identifies in writing to the contractor property from which funds will be derived to be used for payment of the improvement,

(a) the owner's interest in that property up to the value of the amount owing under the contract constitutes, subject to any prior registered encumbrances, trust property held by the owner for the benefit of the contractor,

(b) the contractor may, in respect of his rights to the property under the trust,

(i) in the case of real property, register in the appropriate land titles office a caveat against the property, and

(ii) in the case of property other than real property, register a claim against the property in accordance with, as the case may be,

(A) the *Chattel Security Registries Act*, or

(B) the *Personal Property Security Act*,

and

(c) the funds derived from the owner's interest in that property, subject to any prior encumbrances, are trust funds as if they were funds identified by the owner under subsection (1)(b).

(3) The owner

(a) is the trustee of the trust created by this section, and

(b) shall not, subject to this Act, use the trust funds except for the purposes of the trust.

(4) Notwithstanding subsection (1), where money

(a) is secured by a mortgage or other security, and

(b) is received by or on behalf of the owner to pay for the land or any prior encumbrance,

that money so received does not constitute trust funds.

(5) This section does not apply to the Crown.

Contractor's trust

9(1) Where a contractor receives payment on account of the contract, that contractor, to the extent he owes money to persons who provided work or furnished materials to the improvement, holds that money in trust for the benefit of those persons.

(2) Where a contractor is owed money on account of the contract, that contractor, to the extent he owes money to persons who provided work or furnished materials to the improvement, holds in trust for the benefit of those persons those accounts receivable which represent the amount that is owing to the contractor.

Subcontractor's trust

10(1) Where a subcontractor receives payment on account of the subcontract, that subcontractor, to the extent he owes money to persons who provided work or furnished materials to the improvement, holds that money in trust for the benefit of those persons.

(2) Where a subcontractor is owed money on account of the subcontract, that subcontractor, to the extent he owes money to persons who provided work or furnished materials to the improvement, holds in trust for the benefit of those persons those accounts receivable which represent the amount that is owing to the subcontractor.

Trust account

11(1) A contractor or subcontractor shall maintain any trust funds for which he is a trustee in a trust account.

(2) A trustee

(a) shall maintain his trust account in Alberta in a bank, credit union, treasury branch or trust company, and

(b) shall advise the bank, credit union, treasury branch or trust company in which the trust account is maintained that it is a trust account for the purposes of this Act.

(3) A trustee may consolidate all trust funds for which he is a trustee into one trust account.

(4) Notwithstanding anything in this section, where a contractor or subcontractor does not in the ordinary course of business handle trust funds other than wages of persons employed by him, he is not required to establish or maintain a trust account.

(5) Trust funds do not cease to be trust funds by reason only that the funds are not deposited or maintained in a trust account.

Payment of trust funds

12(1) A trustee shall not appropriate or convert any part of the trust funds in respect of which he is the trustee to his own use or to any use inconsistent with the trust until all beneficiaries for whose benefit the trust is constituted are paid all amounts related to the improvement that are owing to them by the trustee.

(2) Notwithstanding subsection (1), where a trustee has on deposit in his trust account funds that are in excess of the amounts that he owes to the beneficiaries of the trust, the trustee may appropriate or convert that excess to his own use.

(3) Where, in determining the amount owing to a beneficiary, a trustee in good faith underestimates the amount owing to the beneficiary, the trustee has not committed a breach of trust if he returns to the trust account an amount that is equal to the amount actually owing to the beneficiary.

(4) Where a trustee makes a payment under the trust to a person entitled to receive the payment, the trustee is, to the extent of that payment, discharged from his obligations and liabilities as trustee to all beneficiaries of the trust.

Consideration other than money

13(1) Where all or a significant part of the consideration of a contract is other than money, the contractor is deemed to have received under the contract trust funds in an amount that is equal to the total sums owing to persons for whom the contractor is trustee.

(2) Where all or a significant part of the consideration of a subcontract is other than money, the subcontractor is deemed to have received under the subcontract trust funds in an amount that is equal to the total sums owing to persons for whom the subcontractor is trustee.

Trustee pays with other funds, etc.

14 Where a trustee

(a) pays in whole or in part for work provided or materials furnished to or in respect of an improvement, or

(b) pays a beneficiary pursuant to a contract or subcontract,

out of money that is not subject to a trust, the trustee may retain from money that would otherwise be trust funds an amount equal to that paid by him.

Trustee pays out of borrowed money

15 Where a trustee

(a) pays in whole or in part for work provided or materials furnished to or in respect of an improvement, or

(b) pays a beneficiary pursuant to a contract or subcontract

out of money that has been lent to him, money that would otherwise be trust funds may be applied to discharge the loan to the extent that the lender's money was so used by the trustee.

Set off by trustee

16 As between himself and the person he is liable to pay under a contract or subcontract with respect to an improvement, a trustee may retain from trust funds owing to that person an amount that is equal to the balance in the trustee's favour of all outstanding claims or damages that are related to the improvement with respect to work provided or materials furnished by that person.

Priorities

17 In addition to any other priority that a beneficiary of a trust may have at law, a beneficiary has priority over all general or special assignments, security interests, judgments, attachments, garnishments and receiving orders, whenever received, granted, issued or made in respect of the contract or subcontract price or any portion of the contract or subcontract price.

Summary disposition of dispute re trust money

18(1) An application for directions may be made to the Court by originating notice where a dispute arises with respect to a trust constituted under this Part.

(2) An application under subsection (1) may be made by

(a) any beneficiary of the trust,

(b) the trustee, or

(c) any other person claiming an interest in the trust funds.

(3) Where a person applies to the Court under this section, notice of the application shall be served,

(a) in the case of an application made by the trustee, on

(i) the beneficiaries of the trust, and

(ii) any other person as the Court directs,

(b) in the case of an application made by a beneficiary of the trust, on

(i) the trustee,

(ii) any other beneficiaries of the trust, and

(iii) any other person as the Court directs,

and

(c) in the case of an application made by a person other than the trustee or a beneficiary of the trust, on

(i) the trustee,

(ii) the beneficiaries of the trust, and

(iii) any other person as the Court directs.

(4) On the filing of an originating notice with the Court, the Court may, if it considers it necessary in the circumstances, hear an interim application on such notice as the Court determines and make an interim order granting such relief as the Court considers appropriate pending the determination of the application.

(5) An interim order under subsection (4) may be made ex parte if the Court considers it appropriate to do so in the circumstances.

(6) In determining the application, the Court may

(a) grant its order subject to any terms or conditions that the Court considers appropriate in the circumstances, and

(b) award costs in respect of the matter.

Trust not affected

19 A trust is not affected by the fact that the time has expired for

(a) registering a statement of lien under Part 2, or

(b) serving a notice of claim under Part 3.

Appointment of receiver

20(1) At any time after trust funds are owing to a beneficiary under the trust, the beneficiary or any other person having an interest in the trust funds may apply by originating notice to the Court for the appointment of a receiver to receive trust funds for which a trustee is responsible.

(2) Where a person applies to the Court under this section, notice of the application shall be served,

(a) in the case of an application made by a beneficiary to the trust, on

(i) the trustee,

(ii) any other beneficiaries of the trust, and

(iii) any other person as the Court directs,

(b) in the case of an application made by the trustee, on

(i) the beneficiaries of the trust, and

(ii) any other person as the Court directs,

or

(c) in the case of a person having an interest in the trust funds, other than a trustee or a beneficiary of the trust, on

(i) the trustee,

(ii) the beneficiaries of the trust, and

(iii) any other person as the Court directs.

(3) On the filing of an originating notice with the Court, the Court may, if it considers it necessary in the circumstances, hear an interim application on such notice as the Court determines and make an interim order granting such relief as the Court considers appropriate pending the determination of the application.

(4) An interim order under subsection (3) may be made ex parte if the Court considers it appropriate to do so in the circumstances.

(5) In determining the application, the Court may

(a) order the appointment of a receiver on any terms and on the giving of any security or without security, as the Court considers appropriate, and

(b) award costs in respect of the matter.

(6) The net proceeds of any receivership shall be paid into Court and are subject to the claims of all the beneficiaries under the trust.

Division 2
Breach of Trust

Liability for breach of trust

21(1) Where a trustee is in breach of trust or has contravened any provision of this Part, that trustee is, whether or not he is prosecuted under section 24 or 25, liable to any beneficiary of the trust for the damage or loss suffered by reason of that breach or contravention.

(2) Nothing in this Part shall be construed so as to limit any rights or remedies that a beneficiary of a trust may have at law or in equity by reason of a breach of trust.

Joint liability

22(1) All persons who are found liable or have admitted liability for a particular breach of trust or a contravention of any provision of this Part are jointly and severally liable.

(2) A person who is found liable or who has admitted liability for a particular breach of a trust or a contravention of any provision of this Part is entitled to recover contributions, in an amount to be determined by the Court, from any other person also found liable or admitting liability for the breach or contravention.

Liability by corporation

23 Where a corporation is a trustee under this Part, in addition to persons who are otherwise liable in an action for breach of trust or a contravention of a provision of this Part, every director or officer of the corporation who assents to or acquiesces in conduct that he knows or reasonably ought to know amounts to breach of trust or contravention of a provision of this Part by the corporation is liable for the breach or contravention.

Offence

24 Every person who knowingly contravenes any provision of this Part is guilty of an offence.

Offence re directors of corporation

25(1) Every director or officer of a corporation who knowingly assents to or acquiesces in the commission of an offence referred to in section 24 by the corporation is guilty of an offence.

(2) A director or officer of a corporation may be charged with an offence under subsection (1) whether or not the corporation has been charged with or convicted of the offence.

Penalty re individual

26(1) An individual who is guilty of an offence referred to in section 24 or 25

(a) is liable to a fine of not more than

(i) $50 000, or

(ii) 3 times the amount of money unlawfully appropriated or converted by that person in the commission of the offence, if that amount of money can be determined,

whichever is the greater amount, or

(b) is liable to imprisonment for a term not exceeding 2 years,

or to both a fine and imprisonment.

(2) Notwithstanding subsection (1), where a person is guilty of an offence by reason that he does not have the funds to meet his trust obligations under section 13, that person is not liable to imprisonment.

Penalty re corporation

27 A corporation that is guilty of an offence referred to in section 24 is liable to a fine of not more than

(a) $100 000, or

(b) 3 times the amount of money unlawfully appropriated or converted by that corporation in the commission of the offence, if that amount of money can be determined,

whichever is the greater amount.

Limitation period

28 The time limit for laying an information in respect of an offence referred to in section 24 or 25 is 2 years from the day that the offence occurred.

Division 3
Voluntary Payment

Payment by owner, etc.

29(1) Subject to section 30(1) or (2), where

(a) a mortgagee by notification or otherwise has knowledge that

(i) a person is liable on a contract or subcontract for work done or materials furnished, and

(ii) another person has a lien for that work or those materials,

and

(b) the mortgagee is not liable on that contract or subcontract for that work or material,

that mortgagee may make a payment to that other person referred to in clause (a)(ii) for that work or those materials.

(2) Subject to section 30(3), where

(a) an owner by notification or otherwise has knowledge that

(i) a person is liable on a subcontract for work done or materials furnished, and

(ii) another person has a lien for that work or those materials,

and

(b) the owner is not liable on that subcontract for that work or those materials,

that owner may make a payment to that other person referred to in clause (a)(ii) for that work or those materials.

(3) Subject to section 30(4), where

(a) a contractor by notification or otherwise has knowledge that

(i) a person is liable on a subcontract for work done or materials furnished, and

(ii) another person has a lien for that work or those materials,

and

(b) the contractor is not liable on that subcontract for that work or those materials,

that contractor may make a payment to that other person referred to in clause (a)(ii) for that work or those materials.

(4) Subject to section 30(5), where

(a) a subcontractor by notification or otherwise has knowledge that

(i) a person is liable on a subcontract for work done or materials furnished, and

(ii) another person has a lien for that work or those materials,

and

(b) the subcontractor referred to in clause (a) is not liable on that subcontract for that work or those materials,

that subcontractor referred to in clause (a) may make a payment to that other person referred to in clause (a)(ii) for that work or those materials.

Notice of intention to make payment

30(1) A mortgagee may make a payment under section 29(1) in respect of a contract only if the mortgagee

(a) gives written notice to the person liable on the contract of the mortgagee's intention to make the payment under section 29(1), and

(b) has not received from the person to whom a notice was given under clause (a), within 14 days from the day on which the notice was given, an objection to the payment being made.

(2) A mortgagee may make a payment under section 29(1) in respect of a subcontract only if the mortgagee

(a) gives written notice to

(i) the person liable on the subcontract in respect of which the payment is to be made,

(ii) the person liable on the contract, and

(iii) the persons liable on any subcontracts that are intervening between the subcontract of the person referred to in subclause (i) and the contract,

of the mortgagee's intention to make the payment under section 29(1), and

(b) has not received from any person to whom a notice was given under clause (a), within 14 days from the day on which the notice was given, an objection to the payment being made.

(3) An owner may make a payment under section 29(2) in respect of the subcontract only if the owner

(a) gives written notice to

(i) the person liable on the subcontract in respect of which the payment is to be made,

(ii) the person liable on the contract, and

(iii) the persons liable on any subcontracts that are intervening between the subcontract of the person referred to in subclause (i) and the contract,

of the owner's intention to make the payment under section 29(2), and

(b) has not received from any person to whom a notice was given under clause (a), within 14 days from the day on which the notice was given, an objection to the payment being made.

(4) A contractor may make a payment under section 29(3) in respect of a subcontract only if the contractor

(a) gives written notice to

(i) the person liable on the subcontract in respect of which the payment is to be made,

(ii) the person liable on the contract, and

(iii) the person liable on any subcontracts that are intervening between the subcontract of the person referred to in subclause (i) and the contract,

of the contractor's intention to make the payment under section 29(3), and

(b) has not received from any person to whom a notice was given under clause (a), within 14 days from the day on which the notice was given, an objection to the payment being made.

(5) A subcontractor may make a payment under section 29(4) in respect of a subcontract only if the subcontractor

(a) gives written notice to

(i) the person liable on the subcontract in respect of which the payment is to be made,

(ii) the person liable on the contract,

(iii) the persons liable on any subcontracts that are intervening between the contract and the subcontract of the subcontractor giving the notice, and

(iv) the persons liable on any subcontracts that are intervening between the subcontract of the person referred to in subclause (i) and the subcontract of the subcontractor giving the notice,

of the subcontractor's intention to make the payment under section 29(4), and

(b) has not received from any person to whom a notice was given under clause (a), within 14 days from the day on which the notice was given, an objection to the payment being made.

(6) Notwithstanding that an objection has been received under this section, the payment may be made if the objection is withdrawn by the person who made the objection.

Effect of payment

31(1) Where a payment is made

(a) by a mortgagee on a contract under section 29(1), the payment is

(i) a payment on that contract, and

(ii) an advance on the mortgage;

(b) by a mortgagee on a subcontract under section 29(1), the payment is

(i) a payment on that subcontract,

(ii) a payment on any subcontract that is intervening between the subcontract referred to in subclause (i) and the contract, and

(iii) an advance on the mortgage;

(c) by an owner on a subcontract under section 29(2), the payment is

(i) a payment on that subcontract, and

(ii) a payment on any subcontract that is intervening between the subcontract referred to in subclause (i) and the contract;

(d) by a contractor on a subcontract under section 29(3), the payment is

(i) a payment on that subcontract, and

(ii) a payment on any subcontract that is intervening between the subcontract referred to in subclause (i) and the contract;

(e) by a subcontractor on a subcontract under section 29(4), the payment is

(i) a payment on that subcontract, and

(ii) a payment on any subcontract that is intervening between the subcontract referred to in subclause (i) and the subcontract of the subcontractor who made the payment.

(2) Notwithstanding subsection (1), a payment made under subsection (1) is not a payment on any subcontract of a subcontractor who was not given a notice under section 30.

Restriction on making payment

32 Notwithstanding section 30, where,

(a) written notices have been given under section 30, and

(b) the person who gave the notices has not, within the 14-day period, received a written objection from any person who was given the notice,

but prior to the making of the payment, the person who gave the notice receives from a person to whom a notice was given a written objection to the payment being made, the payment shall not be made until the objection is withdrawn by the person who made the objection.

Voiding of objection

33(1) If an objection to the making of a payment is received by the person who gave the notice, that person may by originating notice apply to the Court for an order directing that the objection be voided.

(2) Where a person applies to the Court under this section, notice of the application shall be served on

(a) the person making the objection, and

(b) any other person as the Court directs.

(3) On hearing an application under subsection (1) the Court may, on such terms as it considers appropriate,

(a) direct that the objection be voided, if the Court is of the opinion that the grounds on which the objection was made are frivolous, vexatious or without merit, and

(b) award costs in respect of the matter.

(4) Where an objection is voided under this section, payment may be made under section 29 and the payment has the same effect as if the objection had not been given.

PART 2
BUILDERS' LIEN

Division 1
Creation and Extent of Lien

Application of Part

34 This Part does not apply to

(a) any interest of the Crown in land or improvements, or

(b) any improvements owned or leased by a board of directors of an irrigation district.

Creation of lien

35 A person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any materials to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or materials as remains owing to him, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

Earned interests

36 Where,

(a) pursuant to an agreement, a person earns or will earn an estate or interest in land other than a lien by doing work or furnishing materials in respect of an improvement, and

(b) a person, other than the person referred to in clause (a), does work or furnishes materials in respect of that improvement,

the person referred to in clause (b) has, for so much of the price of the work or materials referred to in clause (b) as remains owing, a lien on the estate or interest earned by the person referred to in clause (a).

Minerals

37 A lien attaching to an estate or interest in mines and minerals also attaches to the minerals when the minerals are severed from the land.

Lien re lease or life estate

38(1) When work is done or materials are furnished in respect of an improvement on a freehold estate for a life or lives or a leasehold estate, the lien shall also attach to the estate in fee simple but only if

(a) before the work is commenced or the materials are furnished, the person who is to do the work or furnish the materials serves on the person who owns the estate in fee simple a written notice of the work to be done or the materials to be furnished and within 7 days of being served with that notice the person who owns the estate in fee simple does not serve on the person who issued the notice a written answer to that notice stating that he, the person who owns the estate in fee simple, will not be responsible for the doing of the work or the furnishing of the materials,

(b) the person who owns the estate in fee simple agrees in writing with the person that is to do the work or furnish the materials that he, the person who owns the estate in fee simple, will be responsible for the doing of the work or the furnishing of the materials, or

(c) the person who owns the estate in fee simple expressly requested the person doing the work or furnishing the materials to do the work or to furnish the materials.

(2) When the estate on which a lien attaches is leasehold, no forfeiture or cancellation of a lease, except for non-payment of rent, is effective to deprive a lienholder of the benefit of the lien.

(3) Notwithstanding subsection (2), the lienholder may, in order to avoid forfeiture or termination of the lease for non-payment of rent, pay any rent due or accruing due on the lease and continue the lease to its term and the sum so paid may be added to the claim of the lienholder.

(4) A notice issued under subsection (1)(a) shall set forth an address for service on the person issuing the notice.

(5) This section does not apply to work done or materials furnished in respect of the recovery or production of minerals.

Limitation of lien re lots

39(1) In this section, "lot" means a lot, block or parcel.

(2) When the same lien attaches to estates or interests in more than one lot in respect of separate improvements made on each lot, the lien does not apply so as to make the owner of any one lot liable in respect of that lot for a sum that is in excess of the price of the work done or materials furnished in respect of the improvement on the lot.

(3) In determining under subsection (2) the amount for which the owner of any one lot is liable, there shall be deducted a proportionate share of any money paid to the person claiming the lien in respect of the work done on or the materials furnished for all the lots to which the lien attaches.

Date of lien

40 The lien created by this Act arises when the work is begun or the first materials are furnished.

Priorities re judgments, etc.

41(1) A lien has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises.

(2) Notwithstanding subsection (1), if, before a statement of lien is registered in respect of a lien, a payment is made pursuant to an assignment, attachment, garnishment or receiving order to a person for whose benefit the assignment, attachment, garnishment or receiving order is made or issued, that payment takes priority over the lien.

Priorities re mortgage

42(1) A registered mortgage or a mortgage registered by way of a caveat has priority over a lien to the extent of the mortgage money secured or advanced in money in good faith prior to the registration of the statement of lien.

(2) Advances or payments made under a mortgage after a statement of lien has been registered rank after the lien.

(3) Notwithstanding subection (2), a mortgagee who has applied mortgage money in payment of a lien for which a statement of lien has been registered is subrogated to the rights and priority of the lienholder who has been so paid to the extent of the money so applied.

Priorities re agreement for sale

43(1) An agreement for sale of land in respect of which a caveat has been filed and any money secured or payable under the agreement in good faith has the same priority over a lien as is provided for a mortgage and mortgage money under section 42.

(2) For the purposes of this Act, with respect to an agreement for sale for which a caveat has been filed,

(a) the seller shall be deemed to be a mortgagee, and

(b) any money secured and payable under that agreement in good faith shall be deemed to be mortgage money secured or advanced in good faith.

Advancing of money

44 Where

(a) a search is made of a certificate of title,

(b) at the time of the search there is not any statement of lien endorsed on that certificate of title, and

(c) on the day that search is made, in reliance on that search,

(i) mortgage money is advanced under a mortgage registered against that certificate of title, or

(ii) money is paid under a contract or subcontract for work done or materials furnished in respect of the land for which the certificate of title was issued,

that money shall be deemed to have been advanced or paid, as the case may be, before the registration of any statement of lien not disclosed by that search notwithstanding that a statement of lien was registered against that certificate of title on the day that the search was made.

Land owned by married person

45(1) For the purposes of this Act, when

(a) work is done or materials are furnished in respect of land in which a married person has an estate or interest, and

(b) the work is done or the materials are furnished with the privity of the spouse of the married person,

the spouse shall be conclusively presumed to be acting as the agent of the married person as well as for himself.

(2) The presumption arising under subsection (1) applies only in respect of that part of the work done or portion of the materials furnished before the person doing the work or furnishing the materials has had actual notice that the spouse is not the agent of the married person who has an estate or interest in the land.

Insurance

46 Where

(a) an improvement is wholly or partly destroyed or damaged,

(b) an amount is paid or payable to the owner by reason of insurance on the land or improvement, and

(c) the destruction or damage took place after the commencement of an action to enforce a lien for which a statement of lien is registered against the title to the land,

the amount derived or to be derived by the owner from the proceeds of the insurance shall, to the extent of any amounts claimed under statements of claim registered against the land, be paid into Court to the credit of the action.

Removal of material

47 Subject to section 48, during the continuance of a lien no part of the materials giving rise to the lien shall be removed to the prejudice of the lien.

Unpaid vendor's lien

48(1) Materials that have actually been delivered and that are to be used for an improvement but are not yet incorporated into the improvement

(a) are, until the materials are incorporated into the improvement, subject to an unpaid vendor's lien in favour of the person furnishing the materials, and

(b) are not subject to execution or other process to enforce a debt other than a debt for the purchase of the materials that is due to the person furnishing the materials.

(2) For the purposes of enforcing an unpaid vendor's lien referred to in subsection (1), the unpaid vendor's lien is deemed to include the right to levy distress under the *Seizures Act* with respect to the materials that are subject to the unpaid vendor's lien.

(3) If the owner has paid the contractor or the supplier for the materials referred to in subsection (1), an unpaid vendor's lien ceases to exist in respect of those materials.

Retaining of funds on registration of lien

49 Notwithstanding any provision in any contract or other agreement, the owner, without incurring any liability for doing so, may retain during any time that a statement of lien is registered an amount that is sufficient to satisfy the amount claimed under the lien.

Liability under liens

50(1) If, during the time that one or more statements of lien are registered against the title to the land, the owner retains the amount claimed pursuant to the liens or as determined pursuant to this Act, the liens do not, regardless of the amounts claimed under those registered statements of lien, make the owner liable for a sum that is greater than the sum owing by the owner under the contract.

(2) Where

(a) a statement of lien is registered against the title to the land,

(b) the owner does not retain the amount claimed pursuant to the lien or as determined pursuant to this Act, and

(c) the owner during the time that the statement of lien is registered makes a payment under the contract with respect to work done or materials furnished on or in respect of the improvement,

the owner is, regardless of the sum owing by the owner under the contract, liable to the lienholder for the amount claimed under the statement of lien or such lesser amount, if any, as may be determined pursuant to this Act.

(3) Where a statement of lien is registered by a person other than a contractor, the liability of the owner in respect of the lien is limited to the amount owing to the contractor, subcontractor or other person for whom the work was done or materials were furnished.

(4) A lien shall not attach the estate or interest in land against which it is registered for a sum that is greater than the sum stated in the statement of lien.

Merging of lien

51(1) A lien is not merged, paid, satisfied, prejudiced or destroyed by

(a) the taking of any security,

(b) the acceptance of a promissory note or bill of exchange,

(c) the taking of any acknowledgment of the claim,

(d) the giving of time for payment, or

(e) the taking of proceedings for the recovery of a personal judgment,

unless the lienholder agrees in writing that such an action is to have that effect.

(2) If a promissory note or bill of exchange that has been issued in respect of the claim of a lienholder has been negotiated, the lienholder does not thereby lose his lien if he is the holder of the promissory note or bill of exchange

(a) at the time of the commencement of proceedings by him to enforce the lien, or

(b) where he is a party in proceedings that are brought by another lienholder, at the time he is made a party to those proceedings.

Proving claim

52 If,

(a) in respect of money owing to a lienholder under a claim, the period of credit in respect of the claim has not expired or there has been an extension of time for payment of the claim,

(b) proceedings are commenced by any other person to enforce a lien against the same property, and

(c) the lienholder referred to in clause (a) has registered a statement of lien and is made a party to the proceedings referred to in clause (b),

the lienholder referred to in clause (a) may, nevertheless, prove and obtain payment of his claim therein as if the period of credit or the extended time had expired.

Division 2
Registration of Liens

Registration of lien

53(1) A lien may be registered in the land titles office of the land registration district in which the land is situated by filing a statement of lien with the Registrar.

(2) A lienholder shall not register a statement of lien that claims a sum greater than the value of the work done or material furnished at the time of the registration of the lien unless the owner consents in writing to the registration of a statement of lien for a greater sum.

(3) The statement of lien shall set out the following:

(a) the name and address of

(i) the lienholder,

(ii) the owner or alleged owner, and

(iii) the person for whom the work was or is being done or the materials were or are being furnished;

(b) a short description of the work done or of the materials furnished;

(c) the sum claimed for work done or materials furnished;

(d) a description, sufficient for registration, of the land and the estate or interest in it to be charged;

(e) an address for service of the lienholder in Alberta.

(4) A statement of lien must be signed by the lienholder.

(5) In the case of a lien arising in connection with an improvement relating to the recovery or production of minerals it is not necessary to set out in the statement of lien the name of the owner or alleged owner of the estate or interest in land to which the lien attaches.

(6) When a lienholder desires to register a statement of lien against a railway, it is a sufficient description of the land to describe it as the land of the railway company.

(7) The statement of lien must be verified by an affidavit of the person who is entitled to enforce the lien.

(8) When the statement of lien is made by a corporation, it must be verified by the affidavit of an officer or employee of the corporation.

(9) When the affidavit is made by a person other than the lienholder it may be made not only as to the facts within the personal knowledge of the deponent, but also as to the facts of which the deponent is informed, if the deponent

(a) gives the source of his information, and

(b) states that he believes the facts to be true.

Land titles office, forms, etc.

54(1) A Registrar shall

(a) maintain a supply of printed forms of statements of lien and affidavits, in blank, and

(b) supply the forms to every person requesting them and desiring to register a statement of lien.

(2) A Registrar shall

(a) decide whether the land titles office for which he is responsible is or is not the appropriate office for the registration of the statement of lien, and

(b) advise the applicant accordingly.

(3) The Registrar shall,

(a) in accordance with the *Land Titles Act*, register the statement of lien as an encumbrance against the estate or interest in the land affected, or

(b) if the land affected by a lien has not been registered under the *Land Titles Act* and subsection (4) does not apply to it, make a record of the statement of lien in a book or in any other manner that the Registrar considers advisable.

(4) When

(a) a lien attaches to an estate or interest in minerals held directly from the Crown in right of Alberta, and

(b) the estate or interest

(i) is less than a fee simple estate, and

(ii) is not registered under the *Land Titles Act*,

the statement of lien shall be registered with the Minister of Energy and not with the Registrar.

(5) This Act applies, with all necessary modifications, to all statements of lien registered under subsection (4) with the Minister of Energy.

Validity of lien

55(1) A substantial compliance with section 53 is sufficient and neither a lien nor a statement of lien shall be invalidated by failure to comply with any requirements of section 53 unless, in the opinion of the Court, the owner, contractor, subcontractor, mortgagee or some other person is prejudiced by the failure.

(2) When, in the opinion of the Court, a person is prejudiced by a failure to comply with section 53, the lien or statement of lien shall be invalidated only to the extent that the person is prejudiced by the default.

(3) Nothing in this section dispenses with the requirement that a statement of lien be registered.

Reinstatement of liens

56(1) On an application by an originating notice to the Court by a lien claimant whose lien has been invalidated by an order or judgment for failure to comply with section 151 or 152 of the *Land Titles Act*, the Court may order the reinstatement of the lien or make any other order that it considers appropriate in the circumstances subject to the order not prejudicing

(a) any rights acquired in good faith for valuable consideration subsequent to the discharge of the statement of lien at the land titles office as a result of the order or judgment invalidating the lien, or

(b) any person who has acted in reliance on

(i) the order or judgment invalidating the lien, or

(ii) the discharge of the statement of lien at the land titles office as a result of the order or judgment invalidating the lien.

(2) In a proceeding under this section the Court may extend any time limits provided for under this Part as the Court considers appropriate in the circumstances.

(3) The originating notice shall be served

(a) on all persons who by the records of the land titles office appear to have an interest in the land in question, and

(b) on any other person as the Court directs.

(4) All persons, including lienholders, served with an originating notice are parties to a proceeding commenced under this section.

(5) The clerk of the Court in which a proceeding is commenced under this section may grant a certificate of lis pendens to a lien claimant

(a) who is a party to the proceeding, and

(b) whose lien was invalidated for failure to comply with section 151 or 152 of the *Land Titles Act*.

(6) A lien claimant who is granted a certificate of lis pendens under subsection (5) may cause the certificate of lis pendens to be registered in the appropriate land titles office.

(7) The Registrar shall cancel registration of a certificate of lis pendens on receiving

(a) a certificate under the seal of the clerk of the Court stating that the proceeding for which the certificate of lis pendens was granted is discontinued, or

(b) a withdrawal of the certificate of lis pendens signed by the person on whose behalf the certificate was registered.

(8) No order or judgment shall be made or granted in any action, including any action commenced before the coming into force of this section, invalidating a lien for the failure of the statement of lien to comply with section 151 or 152 of the *Land Titles Act*.

Change of address

57(1) A lienholder may change his address for service within Alberta by delivering to the Registrar a notice of change of address for service in the prescribed form.

(2) The Registrar shall,

(a) on receipt of a notice of change of address for service, and

(b) on receipt of his proper fee,

enter the notice of change of address in the register and make a memorandum setting forth the new address for service on the registered statement of lien.

Improper registration

58 In addition to any other grounds on which he may be liable, a person who registers a statement of lien against a particular estate or interest in land or a particular parcel of land

(a) for an amount that is grossly in excess of the amount due to him, or

(b) when he knows or ought reasonably to know that he does not have a lien,

is liable for damages and costs, including solicitor-client costs, incurred as a result thereof unless that person satisfies the Court that the registration of

the statement of lien was made or the amount of the lien was calculated in good faith and without negligence.

Time for registration

59(1) This section does not apply to

(a) work done in respect of the recovery of minerals, or

(b) materials furnished in respect of the recovery of minerals.

(2) A statement of lien in respect of a lien for materials may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 45 days from the day that the last of the materials is furnished or the agreement to furnish the materials is abandoned or terminated.

(3) A statement of lien in respect of a lien for the performance of services may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 45 days from the day that the performance of the services is completed or the agreement to provide the services is abandoned or terminated.

(4) A statement of lien in respect of a lien for wages may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 45 days from the day that the work for which the wages are claimed is completed, abandoned or terminated.

(5) In cases not referred to in subsections (2) to (4), a statement of lien in respect of a lien in favour of a contractor or a subcontractor may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 45 days from the day the contract or subcontract, as the case may be, is completed, abandoned or terminated.

(6) Notwithstanding subsections (2) to (5), the time limited by this section for registering a statement of lien is not extended by reason only that something improperly done or omitted to be done in respect of work done or materials furnished is corrected or done, as the case may be, at a later date.

Time for registration re minerals

60(1) This section applies to

(a) work done in respect of the recovery of minerals, or

(b) materials furnished in respect of the recovery of minerals.

(2) A statement of lien in respect of a lien for materials may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 90 days from the day that the last of the materials is furnished or the agreement to furnish the materials is abandoned or terminated.

(3) A statement of lien in respect of a lien for the performance of services may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 90 days from the day that the performance of the services is completed or the agreement to provide the services is abandoned or terminated.

(4) A statement of lien in respect of a lien for wages may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 90 days from the day that the work for which the wages are claimed is completed, abandoned or terminated.

(5) In cases not referred to in subsections (2) to (4), a statement of lien in respect of a lien in favour of a contractor or a subcontractor may be registered at any time within the period

(a) commencing when the lien arises, and

(b) terminating 90 days from the day the contract or subcontract, as the case may be, is completed, abandoned or terminated.

(6) Notwithstanding subsections (2) to (5), the time limited by this section for registering a statement of lien is not extended by reason only that something improperly done or omitted to be done in respect of work done or materials furnished is corrected or done, as the case may be, at a later date.

Division 3
Expiry and Discharge of Lien

Expiry of unregistered lien

61 A lien ceases to exist if a statement of lien for that lien is not registered within the time prescribed by section 59 or 60, as the case may be.

Expiry of registered lien

62 A lien in respect of which a statement of lien has been registered ceases to exist unless, within 180 days from the day the statement of lien is registered,

(a) an action is commenced under this Part to realize on the lien, and

(b) the lien claimant registers a certificate of lis pendens in respect of his lien in the appropriate land titles office.

Lien as charge against money

63 Notwithstanding section 62, if the Court has ordered that a statement of lien be removed under section 67(1) the lien, as a charge against the money paid into Court or the security given, does not cease to exist by reason that

(a) a certificate of lis pendens is not registered in the appropriate land titles office, or

(b) an action has not been commenced within 180 days from the day the statement of lien is registered.

Action not commenced after notice given

64(1) Notwithstanding section 62 or 63, if an owner or another person affected by a lien in respect of which a statement of lien is registered serves written notice on the registered lienholder to commence an action to realize on his lien and the registered lienholder does not

(a) commence an action to realize on the lien, or

(b) where he commences an action to realize on the lien, register in the appropriate land titles office a certificate of lis pendens in respect of his action,

within 30 days from the day the registered lienholder is served with the notice, the lien ceases to exist.

(2) Subsection (1) does not apply with respect to the registration of a certificate of lis pendens where

(a) security is given or payment is made into Court, and

(b) the statement of lien is removed from the title to the land concerned.

(3) Notwithstanding section 119, for the purposes of this section, service of a notice under subsection (1) shall be made only by

(a) personal service,

(b) single registered mail sent to the address for service set out in the statement of lien, or

(c) delivery to the address for service set out in the statement of lien.

Continuation of lien

65(1) A lien that has continued to exist by reason of registration of the certificate of lis pendens relating to that lien continues to exist until

(a) the proceedings are concluded, or

(b) the certificate of lis pendens is discharged,

whichever occurs later.

(2) Notwithstanding subsection (1), if a trial has not been held within 2 years from the day of the registration of the certificate of lis pendens, any interested party may apply on notice to the Court to have the certificate of lis pendens vacated and the statement of lien to which it relates discharged.

Cancellation of lien

66(1) The Registrar shall cancel the registration of a statement of lien either in whole or in part

(a) on receiving notification in the prescribed form signed by the lienholder stating that the lien has been satisfied in whole or in part, or

(b) on receiving proof satisfactory to him that the lien has ceased to exist.

(2) The Registrar shall cancel the registration of a statement of lien in part only on receiving notification in the prescribed form signed by the lienholder

(a) stating that the lien has been satisfied in part only, and

(b) describing that part of the land described in the statement of lien in respect of which the lien has been satisfied.

(3) The Registrar shall cancel the registration of a statement of lien and of any certificate of lis pendens on receiving

(a) a certified copy of an order or judgment of a Court ordering the cancellation of the registration of a statement of lien, or

(b) a certificate under the seal of the clerk of the Court stating that pursuant to an order or judgment of the Court

(i) the amount due by an owner in respect of a lien has been ascertained and paid into Court, or

(ii) the land, improvement or materials have been sold in satisfaction of the lien.

Removal of lien and discharge of liability

67(1) If a statement of lien is registered against a title to land, any person may, with the approval of the Court, give security or pay money into Court in an amount necessary to satisfy the lien as determined by the Court.

(2) For the purposes of obtaining the Court's approval to give security or pay money into Court for the purposes of this section, a person may apply to the Court by

(a) an interlocutory application made in proceedings that have been commenced to enforce a lien, or

(b) an originating notice.

(3) Notice of an application made under this section shall be given in the same manner as if it were a statement of claim referred to in section 73(1).

(4) In determining an application under this section the Court may do one or more of the following:

(a) approve the giving of security or paying money into Court in

(i) the amount of the claim,

(ii) the maximum amount for which the lien may properly attach under section 50, or

(iii) such lesser amount as the Court determines;

(b) direct that the statement of lien be discharged from the title against which it was registered where security is given or money is paid into Court under clause (a);

(c) direct that the statement of lien be discharged from the title against which it was registered on any grounds other than those referred to in clause (b) that the Court considers appropriate;

(d) direct the trial of the matter to determine the amount of security to be given or money to be paid into Court;

(e) dismiss the application;

(f) provide for the payment of costs.

(5) On security being given or money being paid into Court in the amount determined under subsection (4)(a), the owner is discharged from any liability in respect of the lien for which the security is given or the money is paid into Court.

(6) Money paid into Court or any security given under subsection (1)

(a) stands in place of the land,

(b) is subject to the claims of all persons who have registered a statement of lien to the same extent as if the amount paid into Court or the security given were realized by a sale of the land in an action to enforce the lien, and

(c) shall be distributed among those lien claimants referred to in clause (b) in accordance with the priorities provided for in section 84 or 85, as the case may be.

(7) Notwithstanding subsection (6), where, in an action to enforce a lien, an amount is realized from the sale of the land or otherwise,

(a) that amount shall be pooled into a common fund with the amount paid into Court or security given under this section, and

(b) the amount in the common fund shall be distributed in accordance with the priorities provided for in section 84 or 85, as the case may be.

Proof of lien

68(1) At any time following service of a notice of an application referred to in section 67(3), a party may file with the clerk of the Court and serve on the registered lienholder a notice to prove the lien.

(2) A registered lienholder served with a notice to prove lien shall, within 15 days from the day of the service of the notice on him, file in the office of the clerk of the Court in which the proceedings were commenced an affidavit providing detailed particulars of his lien.

(3) Where a registered lienholder on whom a notice to prove lien is served does not file his affidavit

(a) within 15 days from the day of the service of the notice, or

(b) within any further period that the Court may order on application on notice,

that person's lien ceases to exist.

(4) Any party to the application may examine the registered lienholder on his affidavit that is filed pursuant to this section.

Division 4
Enforcement of Lien

Proceedings to enforce lien

69(1) In this section, "prior registered encumbrance" does not include a statement of lien that is registered in respect of a lien.

(2) Proceedings to enforce a lien shall not be commenced unless a statement of lien has been registered in respect of that lien.

(3) Proceedings to enforce a lien shall be commenced by statement of claim.

(4) Lienholders shall not be named as defendants.

(5) When the party issuing the statement of claim is not the contractor, the statement of claim shall name as defendants

(a) the owner,

(b) the contractor, and

(c) the holder of any prior registered encumbrance against whom relief is sought.

(6) When the person issuing the statement of claim is the contractor, he shall name as defendants

(a) the owner, and

(b) the holder of any prior registered encumbrance against whom relief is sought.

(7) The procedure in adjudicating on the claims shall be of a summary character, so far as is possible, having regard to the amount and nature of the liens in question and the enforcement of them at the least expense.

Parties to proceedings

70 All persons named as parties in the statement of claim and all registered lienholders are parties to the proceedings.

Certificates of lis pendens

71(1) The clerk of the Court in which an action is commenced may grant a certificate of lis pendens to any lienholder who is a party to the proceedings.

(2) Any lienholder who is a party to the proceedings and to whom a certificate of lis pendens is granted may cause the certificate of lis pendens to be registered in the appropriate land titles office.

(3) The Registrar shall cancel registration of a certificate of lis pendens on receiving

(a) a certificate under the seal of the clerk of the Court stating that proceedings for which the certificate of lis pendens was granted are discontinued, or

(b) a withdrawal of the certificate of lis pendens signed by the person on whose behalf the certificate was registered.

(4) The Registrar without charge may on his own initiative, and shall on request, cancel registration of a lien where the lien has ceased to exist under section 62.

Consolidation of actions

72 If more than one action is commenced to enforce liens in respect of the same land, the Court

(a) may, on the application of any person interested, consolidate the actions into one action, and

(b) may give the conduct of the consolidated action to any plaintiff as it considers appropriate.

Service of statement of claim

73(1) Unless otherwise ordered, the statement of claim shall be served on

(a) all persons who are parties to the proceedings,

(b) all persons who by the records of the land titles office appear to have an interest in the land against which a statement of lien is registered, and

(c) any person not referred to in clauses (a) and (b) as the Court directs.

(2) The Court may on application dispense with service of the statement of claim on any person subject to those conditions, if any, that it considers appropriate in the circumstances.

Time for filing defence

74(1) The time within which a defendant may file a statement of defence or demand of notice is the period limited for the filing of defence by the Alberta Rules of Court.

(2) A party not named as a defendant is not required to file a statement of defence.

Notice to prove lien

75(1) At any time following the issuance of the statement of claim, a party may file with the clerk of the Court and serve on any registered lienholder a notice to prove lien in the prescribed form.

(2) A registered lienholder served with a notice to prove lien shall, within 15 days from the day of the service of the notice on him, file in the office of the clerk of the Court in which the proceedings were commenced an affidavit providing detailed particulars of his lien.

(3) Where a registered lienholder on whom a notice to prove lien is served does not file his affidavit

(a) within 15 days from the day of the service of the notice, or

(b) within any further period that the Court may order on application on notice,

that person's lien ceases to exist.

(4) Any party to the action may examine a registered lienholder on his affidavit filed pursuant to this section.

Pre-trial application

76(1) At any time following the expiry of the time within which a statement of defence may be filed, the plaintiff may, and before the action is set down for trial the plaintiff shall, make a pre-trial application.

(2) The plaintiff shall serve notice of the pre-trial application on all other parties to the proceedings at least 10 days before the date of the application.

(3) On the hearing of the pre-trial application, the Court may do one or more of the following:

(a) if no defence has been filed and no notice to prove lien has been filed and served, declare any lien for which a statement of lien is registered to be valid and make any further judgment or order it considers appropriate;

(b) if defence has been filed, give judgment declaring valid any lien in respect of which a statement of lien has been registered and for which no notice to prove lien has been filed;

(c) consider the affidavits filed on service of notice to prove lien and the transcript of any examination on them, and may

(i) determine summarily the validity of the liens concerned,

(ii) hear oral evidence, and

(iii) direct that at the trial of the action any particular issue or issues arising on the application be determined;

(d) make any further order or direction it considers appropriate, including an order that the property be sold pursuant to this Part and an order that the action be entered for trial;

(e) order that the lienholder or other party be given the carriage of the proceedings;

(f) order that examinations for discovery be held.

(4) No examinations for discovery shall be held without an order of the Court directing such.

Appointment of receiver, etc.

77(1) At any time after a statement of claim has been issued to enforce a lien,

(a) any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the Court for the appointment of a receiver of the rents and profits from the property against which the statement of lien is registered, and

(b) the Court may order the appointment of a receiver on any terms and on the giving of any security or without security, as the Court considers appropriate.

(2) At any time after a statement of claim has been issued to enforce a lien,

(a) any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the Court for the appointment of a trustee, and

(b) the Court may, on the giving of any security or without security, as the Court considers appropriate, appoint a trustee

(i) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the Court, and

(ii) with power, on approval of the Court, to complete or partially complete the improvement.

(3) Mortgage money advanced to the trustee as the result of any of the powers conferred on him under this section takes priority over all liens existing at the date of the appointment of the trustee.

(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the Court so directs.

(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into Court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

(6) The Court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind, including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

Uncompleted or abandoned contract

78(1) Subject to subsection (2), a lienholder may enforce his lien notwithstanding the non-completion, termination or abandonment of any contract or subcontract under which his lien arises.

(2) Subsection (1) does not apply in favour of a contractor or subcontractor whose contract or subcontract provides that nothing is to be paid until completion of the contract or subcontract, as the case may be.

Entering action for trial

79 When a defence has been filed and no order is made on the pre-trial application for the holding of a trial, the plaintiff or any other party may enter the action for trial.

Adjudication of claims

80 On the trial of the action, the Court

(a) shall decide all questions that arise in the trial that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the parties, and

(b) shall take all accounts, make all inquiries, give all directions and do all other things necessary to finally dispose of the action and of all matters, questions and accounts arising in it and to adjust the rights and liabilities of and give all necessary relief to all parties.

Failure to establish valid lien

81 If a person claiming to have a lien fails to establish a valid lien, he may nevertheless be awarded personal judgment against any party to the proceedings for any sum that is due to the claimant that he might recover in an action against that party.

Sale of land

82(1) Where proceedings have been taken to enforce a lien for which a statement of lien has been registered, the Court may order that the estate or interest in land that is charged with the lien be sold.

(2) When a mortgage or other registered encumbrance is prior to a lien under this Part, the Court may order that in a sale under this Part

(a) the property be sold subject to the mortgage or encumbrance, or

(b) the property be sold at an upset price of not less than the amount secured under the mortgage or encumbrance, costs, and the costs of the sale.

(3) When the Court orders a sale, the Court may

(a) direct that the sale take place at any time after the judgment, allowing a reasonable time for advertising,

(b) direct what advertising of the sale is required, and

(c) make all necessary orders and directions for the completion of the sale and the vesting of the estate or interest in the purchaser.

(4) The Court may direct the sale and removal of any materials.

Payment into Court

83 When money is realized from

(a) a sale, receivership or trusteeship under this Part, or

(b) insurance to which section 46 applies,

the money shall be paid into Court for distribution under this Part.

Payment out of Court re sufficient funds

84 If there is sufficient money paid into Court to pay the claims, costs and disbursements of

(a) the lienholders who have registered statements of lien in respect of their liens,

(b) all labourers employed by the owner, contractor or subcontractor for wages owing, and

(c) any person who

(i) has registered a mortgage or encumbrance prior to a lien, or

(ii) is a receiver or trustee under this Part,

and that is to be paid out from the proceeds of the sale of the interest or estate in land,

the Court shall on application by the plaintiff or any party to the action direct that the money be paid out of Court to the claimants as they are entitled in respect of their claims, costs and disbursements.

Payment out of Court re insufficient funds

85(1) If there is not sufficient money paid into Court to satisfy all the claims, costs and disbursements referred to in section 84, the Court shall on application by the plaintiff or any party to the action certify the following:

(a) the amount of the deficiency,

(b) the names of the persons who are entitled to share the money in Court,

(c) the amounts that the various persons interested are entitled to receive from the money in Court,

(d) the persons adjudged to pay any money, and

(e) any credits allowed to those persons under this Part.

(2) If there is insufficient money paid into Court to satisfy all the claims, costs and disbursements referred to in section 84, the money shall be disbursed in the following order:

(a) in the case where the estate or interest in land was sold subject to a mortgage or encumbrance or there was no mortgage or encumbrance registered prior to a statement of lien,

(i) firstly, in paying the costs of those parties to whom costs have been awarded by the Court

(A) with respect to the proceedings, and

(B) with respect to the registering and proving the liens in respect of which statements of lien have been registered;

(ii) secondly, in paying 6 weeks' wages, if so much is owing, of all labourers employed by the owner, contractor or subcontractor;

(iii) thirdly, in paying the several amounts owing to lienholders other than the contractor who have registered statements of lien in respect of liens;

(iv) fourthly, in paying the amount owing to the contractor;

(b) in the case where the estate or interest in land was sold at an upset price of not less than the amount secured under the mortgage or encumbrance, the costs and the costs of the sale,

(i) firstly, in payment of all amounts due, including costs and costs of sale, to the holders of mortgages or other registered encumbrances that are prior to liens under this Act;

(ii) secondly, in paying the costs of all lienholders who have registered statements of lien in respect of their liens

(A) with respect to the proceedings, and

(B) with respect to the registering and proving of their liens;

(iii) thirdly, in paying 6 weeks' wages, if so much is owing, of all labourers employed by the owner, contractor or subcontractor;

(iv) fourthly, in paying the several amounts owing to lienholders other than the contractor who have registered statements of lien in respect of their liens;

(v) fifthly, in paying the amount owing to the contractor.

(3) Notwithstanding subsection (2), where a statement of lien is registered prior to a mortgage or an encumbrance, the holder of that lien shall be treated as if the estate or interest had been sold subject to the mortgage or encumbrance and the funds in Court shall, in respect of that lienholder, be distributed under subsection (2)(a).

(4) Each class of lienholders, as between themselves, ranks without preference for their several amounts and the portion of the money available for distribution to each class shall be distributed among the lienholders in that class proportionately according to the amounts of their respective claims as proved.

(5) If a labourer has more than 6 weeks' wages owing to him by a subcontractor, contractor or owner, the Court shall

(a) order that the sum that is additional to the 6 weeks' wages be deducted out of any sum actually coming to the subcontractor, contractor or owner under a distribution pursuant to subsection (2), and

(b) order that the sum to be paid to the labourer.

Order for removal and sale of structure

86(1) When the work is performed or materials are furnished in respect of which the lien arose result in the creation of an improvement consisting of a structure, erection or building, then

(a) notwithstanding that the structure, erection or building may be affixed to or have become part of the land, and

(b) notwithstanding section 41, 42 or 43,

the Court, if it is of the opinion that it is appropriate to do so, having regard to the value of the improvement, any prior encumbrance and the amount owing on the lien, may, on application of a lienholder who is a party in proceedings to enforce the lien or in any other proceedings affecting the lien, order that

(c) the structure, erection or building be removed and sold, and

(d) the proceeds of the sale, subject to any prior encumbrances, be applied on the lien that arose in respect of the improvements.

(2) If the proceeds of the sale exceed the amount owing, the excess shall be applied in the same manner as the proceeds of the sale of the land and improvements remaining on it would be applied.

Proof of claim after proceedings

87(1) At any time before the amount realized in the proceedings for the satisfaction of liens has been distributed, a lienholder who has not been served with notice of the proceedings may, on application to the Court and on such terms as to costs and otherwise as the Court considers appropriate, be allowed to prove his lien if the lienholder has registered a statement of lien in respect of that lien.

(2) When a lien under subsection (1) is proved and allowed the Court shall amend the judgment to include the lien.

Appeal

88(1) An appeal lies to the Court of Appeal from a decision of the Court under this Part in all matters where the amount of the lien or the total amount of the liens joined in one action or proceedings is $5000 or more.

(2) When the amount of the lien or the total amount of the liens joined is less than $5000 the decision of the Court of first instance is final.

Fees

89 No fees are payable to a Registrar or to a Court

(a) in connection with the registration or discharge of any proceedings taken by a labourer to realize a claim for wages under this Part, or

(b) on the filing of an order, record or judgment or other proceeding in connection therewith.

PART 3
NOTICE OF CLAIM

Definitions

90 In this Part,

(a) "claimant" means a person who issues a notice of claim;

(b) "Minister" means the Minister or other person, board, commission or agency that is responsible for an improvement to which this Part applies.

Application of Part

91 This Part applies only to the Crown's interest in land or improvements.

Right to issue notice of claim

92(1) A person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

for the Crown, a contractor or a subcontractor may, for so much of the price of the work or material as remains owing to him, issue and serve on the Minister a notice of claim setting out the nature and the amount of the claim.

(2) The right to issue a notice of claim arises when work is begun or the first materials are furnished.

(3) A person shall not issue a notice of claim that claims a sum greater than the value of the work done or material furnished at the time of the issuance of the notice of claim unless the Minister consents in writing to the issuance of a notice of claim for a greater sum.

Improper notice of claim

93 In addition to any other grounds on which he may be liable, a person who serves on the Minister a notice of claim

(a) for an amount that is grossly in excess of the amount due to him or that he expects to become due to him, or

(b) when he knows or ought reasonably to know that the amount he is claiming is not due and owing to him,

is liable for legal and other costs and damages incurred as a result thereof unless that person satisfies the Court that the amount claimed in the notice of claim was calculated in good faith and without negligence.

Time for serving a notice of claim

94(1) This section does not apply to

(a) work done in respect of the recovery of minerals, or

(b) materials furnished in respect of the recovery of minerals.

(2) A notice of claim with respect to materials may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 45 days from the day that the last of the materials is furnished or the agreement to furnish the materials is abandoned or terminated.

(3) A notice of claim with respect to the performance of services may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 45 days from the day that the performance of the services is completed or the agreement to provide the services is abandoned or terminated.

(4) A notice of claim with respect to wages may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 45 days from the day that the work for which the wages are claimed is completed, abandoned or terminated.

(5) In cases not referred to in subsections (2) to (4), a notice of claim in favour of a contractor or a subcontractor may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 45 days from the day the contract or subcontract, as the case may be, is completed, abandoned or terminated.

(6) Notwithstanding subsections (2) to (5), the time limited by this section for serving a notice of claim on the Minister is not extended by reason only that something improperly done or omitted to be done in respect of work done or materials furnished is corrected or done, as the case may be, at a later date.

Time for registration re minerals

95(1) This section applies to

(a) work done in respect of the recovery of minerals, or

(b) materials furnished in respect of the recovery of minerals,

where the Crown in right of Alberta has entered into a contract with a person for the express purpose of producing the Crown's own minerals.

(2) A notice of claim with respect to materials may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 90 days from the day that the last of the materials is furnished or the agreement to furnish the materials is abandoned or terminated.

(3) A notice of claim with respect to the performance of services may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 90 days from the day that the performance of the services is completed or the agreement to provide the services is abandoned or terminated.

(4) A notice of claim with respect to wages may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 90 days from the day that the work for which the wages are claimed is completed, abandoned or terminated.

(5) In cases not referred to in subsections (2) to (4), a notice of claim in favour of a contractor or a subcontractor may be served on the Minister at any time within the period

(a) commencing when the right to issue a notice of claim arises, and

(b) terminating 90 days from the day the contract or subcontract, as the case may be, is completed, abandoned or terminated.

(6) Notwithstanding subsections (2) to (5), the time limited by this section for serving a notice of claim on the Minister is not extended by reason only that something improperly done or omitted to be done in respect of work done or materials furnished is corrected or done, as the case may be, at a later date.

Retaining of funds

96 Notwithstanding any provision in any contract or other agreement, the Minister, without incurring any liability for doing so, may, after being served with a notice of claim, retain an amount that is sufficient to satisfy the amount claimed under the notice of claim.

Liability under notice of claim

97(1) If, during the time that one or more notices of claim remain in effect after they are served on the Minister, the Minister retains the amount claimed pursuant to the notices or as determined pursuant to this Act, the notices do not, regardless of the amounts claimed under those notices, make the Minister liable for a sum that is greater than the sum owing by the Minister under the contract.

(2) Where

(a) a notice of claim is served on the Minister,

(b) the Minister does not retain the amount claimed pursuant to the notice or as determined pursuant to this Act, and

(c) the Minister during the time that the notice remains in effect after it is served on the Minister makes a payment under the contract with respect to work done or materials furnished on or in respect of the improvement,

the Minister is, regardless of the sum owing by the Minister under the contract, liable to the claimant for the amount claimed under the notice or such lesser amount, if any, as may be determined pursuant to this Act.

(3) Where a notice of claim is served on the Minister by a person other than a contractor, the liability of the Minister in respect of the notice is limited to the amount owing to the contractor, subcontractor or other person for whom the work was done or to whom materials were furnished.

(4) A notice of claim cannot require a payment of an amount that is greater than the sum stated in the notice.

Discharge of liability

98(1) If a notice of claim is served on the Crown, the Minister may, with the approval of the Court, give security or pay money into Court in an amount necessary to satisfy the claim as determined by the Court.

(2) For the purposes of obtaining the Court's approval to give security or pay money into Court for the purposes of this section, the Minister may apply to the Court by an originating notice.

(3) In determining an application under this section the Court may do one or more of the following:

(a) approve the giving of security or paying money into Court in

(i) the amount of the claim, or

(ii) such lesser amount as the Court determines;

(b) direct the trial of the matter to determine the amount of security to be given or money to be paid into Court;

(c) dismiss the application;

(d) provide for the payment of costs.

(4) On security being given or money being paid into Court under subsection (3)(a), the Crown is discharged from any liability arising under the notice of claim.

Proof of claim

99(1) At any time following service of a notice of an application referred to in section 98(2) a party to the application may file with the clerk of the Court and serve on any claimant a notice to prove his claim.

(2) A claimant who is served with a notice to prove his claim shall, within 15 days from the day of the service of the notice on him, file in the office of the clerk of the Court in which the proceedings were commenced an affidavit providing detailed particulars of his claim.

(3) Where a claimant on whom a notice to prove his claim is served does not file his affidavit

(a) within 15 days from the day of the service of the notice, or

(b) within any further period that the Court may order on application on notice,

that person's rights under that notice of claim cease to exist.

(4) Any party to the application may examine a claimant on his affidavit that is filed pursuant to this section.

Priorities re judgments, etc.

100(1) A claim for which a notice of claim may be issued has priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the claim arises.

(2) Notwithstanding subsection (1), if, before a notice of claim is served in respect of a claim, a payment is made pursuant to an assignment, attachment, garnishment or receiving order to a person for whose benefit the assignment, attachment, garnishment or receiving order is made or issued, that payment takes priority over the claim.

Notification on job site

101 Where work is to be done or materials are to be furnished in respect of an improvement to which this Part applies, the Minister may cause a notice to be posted in a conspicuous place on the job site at which the work is to be done or the materials are to be furnished stating

(a) that the improvement is one to which this Part applies, and

(b) an address for service for any notice of claim issued in respect of that work or those materials.

PART 4
RIGHT TO INFORMATION

Inspection of contract

102(1) A beneficiary of a trust or a lienholder, by notice in writing, may at any reasonable time demand the following:

(a) from the owner or the contractor, in the case of a contract,

(i) the names of the parties to the contract,

(ii) the contract price,

(iii) the state of accounts between the owner and the contractor, and

(iv) a copy of any labour and materials payment bond posted by the contractor with the owner in respect of the contract;

(b) from the contractor or a subcontractor, in the case of a subcontract between the contractor and a subcontractor,

(i) the names of the parties to the subcontract,

(ii) the subcontract price,

(iii) the state of accounts between the contractor and the subcontractor,

(iv) a statement as to whether there is a provision in the subcontract providing for certification of the subcontract,

(v) a statement as to whether the subcontract has been certified as complete, and

(vi) a copy of any labour and materials payment bond posted by the subcontractor with the contractor in respect of the subcontract;

(c) from a subcontractor, in the case of a subcontract between a subcontractor and another subcontractor,

(i) the names of the parties to the subcontract,

(ii) the subcontract price,

(iii) the state of accounts between the subcontractors,

(iv) a statement as to whether there is a provision in the subcontract providing for certification of the subcontract,

(v) a statement as to whether the subcontract has been certified as completed, and

(vi) a copy of any labour and material payment bond posted by one subcontractor with the other subcontractor in respect of the subcontract.

(2) If

(a) a demand is made under subsection (1) and

(i) within 21 days from the day that the demand is made, the owner, the contractor or the subcontractor, as the case may be, to whom the demand is made does not produce the information for which the demand is made, or

(ii) the person to whom the demand is made knowingly gives information that is inaccurate or not true,

and

(b) the beneficiary or the lienholder who made the demand sustains loss by reason of the information not being produced or the information not being accurate or true,

the owner, contractor or subcontractor, as the case may be, is liable to the beneficiary or the lienholder who made the demand in an action for the amount of the loss or in proceedings taken under this Act for the enforcement of the lienholder's lien.

Inspection of mortgage, etc.

103(1) A beneficiary of a trust or a lienholder, by notice in writing, may at any reasonable time demand

(a) of a mortgagee, in the case of a mortgage on the land on which work is done or being done or materials are furnished or being furnished in respect of the improvement,

(i) sufficient details in respect of the terms of the mortgage to enable the beneficiary or lienholder, as the case may be, to determine whether the mortgage was taken by the mortgagee for the purposes of financing the improvement, and

(ii) a statement showing the amount advanced under the mortgage, the dates of the advances and any arrears in payment, including arrears in the payment of interest,

or

(b) of an unpaid vendor, in the case of an agreement for sale on the land, a statement showing the amount secured under the agreement for sale and any arrears in payment, including any arrears in the payment of interest.

(2) If

(a) a demand is made under subsection (1) and

(i) within 21 days from the date that the demand is made, the mortgagee or vendor, as the case may be, to whom the demand is made does not produce the information for which the demand is made, or

(ii) the mortgagee or vendor to whom the demand is made knowingly gives information that is inaccurate or not true,

and

(b) the beneficiary or the lienholder who made the demand sustains loss by reason of the information not being produced or the information not being accurate or true,

the mortgagee or vendor, as the case may be, is liable to the beneficiary or the lienholder who made the demand in an action for the amount of the loss or in proceedings taken under this Act for the enforcement of the lienholder's lien.

Direction by Court

104 The Court may, on summary application made by a beneficiary of a trust or a lienholder at any time before or after proceedings are commenced under this Act, make an order requiring

(a) the owner,

(b) the contractor,

(c) a subcontractor,

(d) the mortgagee, or

(e) the unpaid vendor,

as the case may be, to produce and allow the beneficiary or lienholder, as the case may be, to inspect any contract, subcontract, agreement, mortgage, agreement for sale, statement of the amount advanced or statement of the amount due and owing, on any terms as to costs that the Court considers just.

PART 5
CONSTRUCTION INDUSTRY REGISTRATION

Definitions

105 In this Part,

(a) "Board" means the Construction Industry Registration Board established under section 106;

(b) "Minister" means the member of the Executive Council charged by the Lieutenant Governor in Council with the administration of this Part;

(c) "registered" means registered under this Part.

Construction Industry Registration Board

106(1) There is hereby established a board known as the "Construction Industry Registration Board" consisting of not fewer than 11 nor more than 13 persons appointed to the Board by the Minister.

(2) The Minister shall appoint to the Board at least

(a) 2 persons nominated by the Alberta Construction Association,

(b) one person nominated by the Alberta Home Builders' Association,

(c) one person nominated by the Urban Development Institute of Alberta,

(d) one person nominated by the Petroleum Services Association of Canada,

(e) one person nominated by the Canadian Association of Oilweli Drilling Contractors,

(f) one person nominated by the Small Explorers and Producers Association of Canada,

(g) one person who is an architect nominated by The Alberta Association of Architects, and

(h) one person who is a professional engineer and is nominated by that organization having authority to register consulting engineers whose main business is related to the construction industry.

(3) Where an association or organization makes a nomination for the purposes of subsection (2), it shall nominate at least 2 persons for each position that is to be filled.

(4) The term of office of a member on the Board is 2 years.

(5) The Minister shall designate

(a) one of the members of the Board, other than a person nominated under subsection (2), to be the chairman of the Board, and

(b) one of the members of the Board to be the vice-chairman of the Board.

(6) Notwithstanding subsection (4), for the purposes of appointing the first members to the Board, the Minister may appoint not more than one half of the Board for a 3-year term of office.

(7) A reference to an association or organization in this section includes a reference to the successor of that association or organization.

(8) The Board is a corporation.

Subcommittees

107(1) The Board shall appoint the following subcommittees:

(a) a subcommittee to represent the sector of the construction industry that is engaged in home building and home renovations;

(b) a subcommittee to represent the sector of the construction industry that is engaged in commercial and industrial construction;

(c) a subcommittee to represent the sector of industry that is engaged in the exploration or production of mineral resources.

(2) In addition to the subcommittees referred to in subsection (1), the Board may appoint one or more subcommittees to represent any sectors of the construction industry that are not represented by a subcommittee referred to in subsection (1).

(3) A subcommittee shall consist of not more than 6 persons.

(4) At least one of the members of each subcommittee must be a member of the Board.

(5) The Board shall prescribe the term of office of a member of a subcommittee.

By-laws

108(1) The Board shall make by-laws governing

(a) the notice required for and the holding and conduct of its meetings,

(b) the quorum for its meetings,

(c) the remuneration and expenses of its members, and

(d) the indemnification of members of the Board for matters in respect of which a corporation may indemnify its directors pursuant to section 119 of the *Business Corporations Act*,

and may make by-laws respecting other aspects of its internal proceedings.

(2) When the Board has made a by-law, it shall file a copy of the by-law with the Minister within 30 days after making it.

(3) A by-law has no effect unless it is approved by the Minister.

(4) The Minister shall, within 60 days after receiving a copy of a by-law, give written notice to the Board that he approves or does not approve the by-law.

(5) The Minister shall not decline to approve a by-law unless he considers that it

(a) is unjust or prejudicial to the public interest, or

(b) goes beyond the Board's powers to make by-laws.

(6) A by-law, if approved by the Minister, comes into force on the date of the approval or the date, if any, specified for commencement in the by-law, whichever date is later.

(7) A subcommittee shall, with the approval of the Board, make by-laws governing

(a) the notice required for and the holding and conduct of its meetings,

(b) the quorum for its meetings,

(c) the remuneration and expenses of its members, and

(d) the indemnification of members of the subcommittee for matters in respect of which a corporation may indemnify its directors pursuant to section 119 of the *Business Corporations Act*,

and may make by-laws respecting other aspects of its internal proceedings.

Registration

109(1) Every person who

(a) carries on business as a contractor or a subcontractor, and

(b) in his ordinary course of business as a contractor or a subcontractor handles trust funds other than wages of persons employed by him,

must be registered with the Board.

(2) For the purpose of being registered, a person shall apply for registration to the subcommittee representing the sector of the industry in which the person carries on business.

(3) If an applicant meets the requirements for registration, the applicant shall be registered with the Board.

(4) Where in the opinion of the subcommittee that registered a person that person no longer meets the requirements for registration, the subcommittee may, on 7 days' notice to that person, suspend or cancel that person's registration.

(5) A subcommittee may designate

(a) one or more persons who, on behalf of the subcommittee, shall

(i) receive applications for registration,

(ii) determine whether applicants meet the requirements for registration, and

(iii) register or refuse to register applicants,

and

(b) a panel of not more than 3 persons who, on behalf of the subcommittee, shall

(i) determine whether a registrant no longer meets the requirements for registration, and

(ii) suspend or cancel a person's registration.

(6) A decision of a person or panel of persons designated under subsection (5) is a decision of the subcommittee.

(7) Where a person is refused registration or has had his registration cancelled or suspended he shall be served with notification in writing of the refusal, cancellation or suspension.

Review

110(1) Where a subcommittee

(a) has refused to register a person, or

(b) has cancelled or suspended a person's registration,

that person may request that the subcommittee review the refusal, cancellation or suspension, as the case may be.

(2) A refusal, cancellation or suspension shall not be reviewed under this section unless the person requesting the review serves on the subcommittee a written request for the review within 30 days from the day that the person was served with a notification in writing of the refusal, cancellation or suspension.

(3) The subcommittee shall, in conducting a review, afford the person requesting the review the opportunity to make representations and to be represented by counsel.

(4) The subcommittee or a person designated by the subcommittee may conduct such enquiries as the subcommittee considers appropriate for the purposes of the review.

(5) After conducting a review, the subcommittee

(a) shall

(i) subject to any terms that the subcommittee considers appropriate, confirm, vary or quash the refusal, cancellation or suspension,

(ii) set out its decision and the reasons for its decision in writing, and

(iii) serve the written decision and reasons on the person who requested the review,

and

(b) may award costs in respect of the matter.

(6) The subcommittee may appoint from among its members a registration review board of not fewer than 3 persons who shall carry out reviews under this section on behalf of the subcommittee.

(7) A decision of the registration review board is a decision of the subcommittee.

Appeal

111(1) A person whose refusal, cancellation or suspension has been reviewed under section 110 may appeal the decision made in respect of the review by serving on the Board a notice of appeal within 30 days from the day that the person was served with the written decision of review.

(2) The Board shall, within 30 days from being served with a notice of appeal under subsection (1), appoint from among the Board's members an appeal board of not fewer than 3 persons to hear the appeal.

(3) The hearing of an appeal under this section shall be commenced within 30 days from the day that the notice of appeal was served on the Board.

(4) After conducting an appeal, an appeal board

(a) shall,

(i) subject to any terms that the appeal board considers appropriate, do at least one of the following:

(A) confirm the refusal, cancellation or suspension,

(B) direct that the person be registered,

(C) reinstate the cancelled registration,

(D) substitute a suspension for a cancellation of a registration,

(E) remove or vary the suspension,

(ii) set out its decision and the reasons for its decision in writing, and

(iii) serve the written decision and the reasons on the appellant,

and

(b) may award costs in respect of the matter.

(5) A person whose appeal is heard by an appeal board may appeal the decision of the appeal board to the Court on a question of law by filing an originating notice with the Court within 30 days from the day that the person is served with the written decision of the appeal board.

(6) On considering an application made under subsection (5), the Court may

(a) take any action that an appeal board may take under subsection (4), and

(b) award costs in respect of the matter.

Staying of suspension or cancellation

112(1) If a person's registration is suspended or cancelled and that person

(a) requests under section 110 that a review be made of the suspension or cancellation, or

(b) appeals a decision made under section 110,

the suspension or cancellation is stayed pending the determination of the review or appeal unless the subcommittee issuing the suspension or cancellation directs otherwise in writing.

(2) Where

(a) a person's registration is suspended or cancelled, and

(b) a direction is made under subsection (1) that the suspension or cancellation not be stayed,

that person may, by an originating notice, apply to the Court to review the direction made under subsection (1) and to grant an order staying the suspension or cancellation pending the determination of the review or suspension.

(3) On an originating notice's being filed with the Court, the Court may, if it considers it necessary in the circumstances, hear an interim application on 2 days' notice and make an interim order granting such relief as the Court considers appropriate pending the determination of the application.

(4) In determining the application, the Court may

(a) grant its order subject to any terms or conditions it considers appropriate in the circumstances, and

(b) award costs in respect of the matter.

Effect of non-registration

113(1) Where a person is required to be registered and

(a) carries on business as a contractor without being registered as a contractor,

(b) carries on business as a subcontractor without being registered as a subcontractor, or

(c) carries on business as a contractor or a subcontractor, as the case may be, for which he is registered during any time that his registration is suspended or cancelled,

that person remains subject to the obligations imposed on him under Part 1 but he is not entitled to any of the benefits or remedies provided for under that Part.

(2) While a person who is required to be registered under this Part is not registered or his registration is suspended or cancelled, that person

(a) is not eligible to

(i) register a lien under Part 2, or

(ii) issue a notice of claim under Part 3,

and

(b) does not have the capacity to commence or maintain any action or other proceeding in the Court of Appeal, the Court of Queen's Bench or the Provincial Court of Alberta in respect of any contract or subcontract.

(3) Notwithstanding subsection (2), a person

(a) who is not registered, other than by reason of his registration's being suspended or cancelled, may commence and maintain an action or other proceeding in respect of any contract or subcontract for work done or material furnished

(i) during the period of time that his registration was in effect, or

(ii) during the period of time that he was not registered if

(A) at the time he did the work or furnished the materials he was eligible to be registered, and

(B) at the time he commences the action and during the time he maintains the action he is registered,

or

(b) whose registration is suspended or cancelled, may commence and maintain an action or other proceeding with respect to any contract or subcontract for work done or material furnished during the time that his registration was in effect.

Offence and penalty

114 Where a person is required to be registered and

(a) carries on business as a contractor without being registered as a contractor,

(b) carries on business as a subcontractor without being registered as a subcontractor, or

(c) carries on business as a contractor or subcontractor, as the case may be, for which he was registered during any time that his registration is suspended or cancelled,

that person is guilty of an offence and liable to a fine of not more than $10 000 or to imprisonment for a term of not more than 6 months or to both a fine and imprisonment.

Court order re injunction

115(1) Where a person is required to be registered and that person

(a) carries on business as a contractor without being registered as a contractor,

(b) carries on business as a subcontractor without being registered as a subcontractor, or

(c) carries on business as a contractor or a subcontractor, as the case may be, for which he was registered during any time that his registration is suspended or cancelled,

the Board may, whether or not the person has been prosecuted under section 114, apply by an originating notice to the Court for an order requiring that person to cease carrying on business as a contractor or subcontractor during the time that he is not properly registered or his registration is suspended or cancelled.

(2) On an originating notice's being filed with the Court, the Court may, if it considers it necessary in the circumstances, hear an interim application on 2 days' notice and make an interim order granting such relief as the Court considers appropriate pending the determination of the application.

(3) An interim order under subsection (2) may be made ex parte . the Court considers it appropriate to do so in the circumstances.

(4) In determining the application, the Court may

(a) grant its order subject to any terms or conditions it considers appropriate in the circumstances, and

(b) award costs in respect of the matter.

Regulations

116 The Board, with the approval of the Lieutenant Governor in Council, may make regulations

(a) governing the procedures by which persons are to be registered;

(b) classifying persons for the purpose of registration and designating which subcommittee is responsible for the registration of a class of persons;

(c) governing the requirements to be met by a person in order for that person to be registered;

(d) governing the suspension or cancellation of a person's registration;

(e) governing, subject to Part 1, the operation of trust accounts;

(f) governing the bonding of persons registered;

(g) governing the functions of subcommittees;

(h) prescribing fees payable with respect to persons being registered;

(i) prescribing levies that are payable to the Board by registered persons;

(j) governing the investigation and resolution of complaints made to the Board or a subcommittee in respect of persons registered or applying to be registered;

(k) exempting persons or a class of person from the operation of this Part where those persons or that class of person is governed by a plan, scheme or arrangement approved under section 123(e).

PART 6
GENERAL

Assignment

117(1) The rights that a person has under this Act may be assigned.

(2) An assignment made under subsection (1) must be evidenced in writing.

Rights pass on death

118 Unless otherwise disposed of, the rights that a person has under this Act pass on his death to his personal representative.

Service of documents

119(1) In addition to any method of service permitted by law, any document, statement of claim or notice of claim, as the case may be, respecting matters coming under this Act may be served

(a) in the case of proceedings taken under Part 2 by a lienholder, on the lienholder

(i) by personal service,

(ii) by double registered mail sent to the address for service set out in the statement of lien, or

(iii) by delivery to the address for service set out in the statement of lien,

(b) in the case of proceedings taken under Part 3, except where otherwise provided in Part 3,

(i) by personal service,

(ii) by double registered mail sent to the address for service set out in the notice of claim, or

(iii) by delivery to the address for service set out in the notice of claim,

and

(c) in the case of any matter coming under Part 5,

(i) by personal service, or

(ii) by double registered or certified mail sent to the address of the person being served.

(2) Notwithstanding subsection (1), a notice of claim shall be served on the Crown by serving the Minister, as defined in Part 3,

(a) by personal service,

(b) by single registered mail sent to the address for service set out in the notice posted under section 101, or

(c) by delivery to the address for service set out in the notice posted under section 101.

Enforcement of judgment

120 Any judgment given by the Court pursuant to this Act may be enforced by execution or otherwise as a judgment of the Court.

Alberta Rules of Court

121 The Alberta Rules of Court apply in all actions brought under this Act except where and to the extent that they are inconsistent with this Act or the rules prescribed under this Act.

Costs

122 When it appears to the Court in proceedings to enforce a claim under this Act that the proceedings have arisen from the failure of an owner or contractor

(a) to fulfil the terms of his contract of engagement for the work in respect of which the claim is sought to be enforced, or

(b) to comply with this Act,

the Court may order the owner and contractor, or either of them, to pay all the costs of the proceedings in addition to the amount of the contract or subcontract or wages due by him or them to any contractor, subcontractor or labourer and may order a final judgment against the contractor and owner, or either of them, in default for those costs.

Regulations

123 The Lieutenant Governor in Council may make regulations

(a) prescribing rules to expedite and facilitate the business under this Act before any court, and to advance the interests of suitors therein;

(b) prescribing a tariff of costs

(i) as between parties, and

(ii) as between solicitor and client,

payable for services rendered in respect of a lien under this Act;

(c) establishing and governing a plan, arrangement or scheme under which a person

(i) for whose benefit a trust is constituted under Part 1,

or

(ii) who is entitled to register a lien under Part 2,

may issue a release on receiving payment for work done or materials furnished by that person that would have the effect of

(iii) relieving the trustee from any trust obligations with respect to that money so paid, and

(iv) removing any rights of that person to register a lien with respect to the work or material so paid for;

(d) prescribing the method and the documentation that may be used to register a claim referred to in section 8(2)(b)(ii);

(e) approving a plan, arrangement or scheme that governs the receipt, handling and disbursement of funds with respect to work done or materials furnished in respect of an improvement;

(f) exempting persons or a class of person from the operation of Part 1 where those persons or that class of person comes under the operation of a plan, arrangement or scheme approved under clause (e);

(g) prescribing the conditions, if any, under which a plan, arrangement or scheme referred to in clause (e) may operate;

(h) prescribing the conditions, if any, under which a person or class of person may participate in a plan, arrangement or scheme referred to in clause (e);

(i) designating entities or projects to which Part 3 applies;

(j) governing forms to be used under this Act.

Application of former Mechanics' Lien Acts

124*(1) The Mechanics Lien Act, 1960, chapter 64 of the Statutes of Alberta, 1960, continues in effect and applies, notwithstanding its repeal, to any lien registered in a land titles office after June 30, 1961 and before July 1, 1970.*

(2) The Mechanics' Lien Act, chapter 197 of the Revised Statutes of Alberta, 1955, continues in effect and applies, notwithstanding its repeal, to any lien registered in a land titles office on or before June 30, 1961.

Application of Builders' Lien Act

125*(1) Subject to section 72 and subsections (2) and (3) of this section, the Builders' Lien Act continues in effect and applies, notwithstanding its repeal, to any lien registered before the coming into force of this Act.*

(2) The Builders' Lien Act

(a) as enacted immediately prior to the coming into force of the Builders' Lien Amendment Act, 1985 applies

(i) to any contract or subcontract entered into before July 1, 1985,

(ii) to any contract solely for the furnishing of materials, the performance of services or the provision of work by a labourer entered into before July 1, 1985,

(iii) to any subcontract entered into on or after July 1, 1985 that is made under a contract entered into before July 1, 1985, and

(iv) to any contract solely for the furnishing of materials, the performance of services or the provision of work by a labourer entered into on or after July 1, 1985 that is made in respect of a contract entered into before July 1, 1985,

and

(b) as amended by the Builders' Lien Amendment Act, 1985, applies

(i) to any contract entered into on or after July 1, 1985 but prior to the coming into force of this Act,

(ii) subject to clause (a)(iii), to any subcontract entered into on or after July 1, 1985 but prior to the coming into force of this Act, and

(iii) subject to clause (a)(iv), to any contract solely for the furnishing of materials, the performance of services or the provision of work by a labourer entered into on or after July 1, 1985 but prior to the coming into force of this Act,

under which a builder's lien may arise.

(3) Notwithstanding subsection (2),

(a) section 32 of the Builders' Lien Act as amended by the Builders' Lien Amendment Act, 1985, and

(b) section 32.2 of the Builders' Lien Act as enacted by the Builders' Lien Amendment Act, 1985,

apply to a builder's lien accepted for registration in the land titles office under section 25 of the Builders' Lien Act on or after July 1, 1985 but prior to the coming into force of this Act.

Application of Public Works Act

126 *The Public Works Act as it read immediately before the coming into force of section 127 of this Act continues in effect and applies to any contract or subcontract respecting a public work, as defined in the Public Works Act, that was entered into under that Act before the coming into force of this Act.*

Amends RSA 1980 cP-38

127 *The Public Works Act is amended by repealing the heading immediately preceding section 13 and by repealing sections 13 to 19 and substituting the following:*

13(1) In this section,

(a) "Crown" includes a board, commission or agency of the Crown;

(b) "subcontractor" means

(i) a person not contracting directly with the Crown, but contracting with a contractor who holds a contract with the Crown, for the provision of labour, equipment, materials or services to be used in performance of the contract with the Crown, and

(ii) a person contracting with the person first mentioned in subclause (i) for the provision of equipment or both materials and services to be used in the performance of the contract with the Crown.

(2) A contractor or subcontractor who does not file a statutory declaration when required to do so under section 12 is guilty of an offence and is liable to a fine of not less than $10 and not more than $100 for every day during which the default continues.

Repeal

128 *The Builders' Lien Act is repealed on Proclamation.*

Commencement

129 *This Act comes into force on Proclamation.*